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No. 94 949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LINDA M. GREENBLATT,

Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

LINDA M. GREENBLATT,

Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELLEN B. FRIEDLAND
Counsel of Record
DAVID J. MOLTON
MOLTON & MEEKINS
Attorneys for Petitioner
Linda M. Greenblatt
750 Lexington Avenue
New York, New York 10022
(212) 838-1500

140 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Arbitration Act, 9 U.S.C. § 1, et seq., requires the arbitration of a party's rights under a court-approved class action settlement and judgment -- which settlement and judgment retains jurisdiction in the approving District Court for the purpose of enforcing the terms thereof -- when that party, subsequent to the approval of the settlement, voluntarily and with the representation of counsel executes a written arbitration submission agreement which submits the determination of said rights to arbitration?

2. Whether, as a matter of constitutional due process, an absent class member is bound by the provisions of a court-approved class action settlement when the notice of settlement of

said class action, the only information concerning said settlement that was sent to all such absent class members, inadequately and erroneously describes the claim preclusion consequences that would be binding upon all absent class members who did not opt out of the class?

PARTIES TO THE PROCEEDING

I. Active in this aspect of litigation:

Linda M. Greenblatt
Shearson Lehman Hutton, Inc.

II. Not active in this aspect of the litigation:

Arthur W. Hartley and all members of the plaintiff class other than petitioner
Stamford Towers Limited Partnership
Stamford Towers, Inc.
Stamford Towers Depositary Corp.
A. George Kallop
William M. Kahn
Paul W. Perkins
Gary D. Gallagher
Devon B. MacEachron
Richard D. Villari
Michael R. Milversted
Armonce Sullivan and all members of the plaintiff class other than petitioner
Shearson California Radisson Plaza Partners Limited Partnership
Shearson Lehman Commercial Properties III, Inc.
Linda Miller
Robert Kelley
James E. Powlesland
Mark D. Powers
Michael R. Milversted
Douglas M. Harbaugh
Kenneth Braddock
Isabel A. Dempsey

Shearson Lehman Brothers
Group, Inc.
Shearson Lehman
Commercial Properties
Depositary III Inc.
U.S. Hotel Properties
Getty Financial Corporation
Horst Osterkamp
Manhattan Beach Hotel
Properties Ltd.
J. Ronald Getty

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Linda M. Greenblatt ("Greenblatt") respectfully prays that the

Supreme Court of the United States grant a writ of certiorari to review the judgment of United States Court of Appeals for the Ninth Circuit entered on August 26, 1994 in appeal numbers 92-16802 and 92-56528.

OPINIONS BELOW

This petition seeks review of the decision of the United States Court of Appeals for the Ninth Circuit which affirmed the Order of the United States District Court for the Northern District of California, entered on October 2, 1992 in the class action entitled Hartley v. Stamford Towers Limited Partnership, No. C-90-2146-JPV [hereinafter "Hartley"], and the Order of the United States District Court for the Central District of California, entered on November 9, 1992 in the class action entitled Sullivan v.

Shearson California Radisson Plaza Partners Limited Partnership, No. 89-5472-JMI (Jrx) [hereinafter "Sullivan"].

The Ninth Circuit's decision is not reported but appears in the Appendix to this petition. App. A-1-28.[1] The Orders of the District Court are not reported but also appear in the Appendix. A-29-36 (Hartley); A-37-50 (Sullivan).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion affirming the Orders of the District Courts on August 26, 1994. No petition for rehearing was filed. This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. §§ 1254(1) and 2106.

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[1] The form of citation used in this petition is as follows: Citations to the Appendix to this petition appear as "App."

STATUTORY AND CONSTITUTIONAL PROVISIONS

Greenblatt challenges the Orders of the District Courts and the Ninth Circuit's decision as contravening section 2 the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, and the due process clause contained in the Fifth Amendment to the United States Constitution.

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. amend. V.

STATEMENT OF THE CASE

Stating that "[t]he Arbitration Act . . . establishes a 'federal policy favoring arbitration' . . . , requiring that 'we rigorously enforce agreements to arbitrate," Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987)

(citations omitted) [hereinafter "McMahon"], the Court has often addressed and uniformly rejected the lower courts' reluctance to enforce (and, at times, hostility to) arbitration agreements that encompass claims founded upon statutory rights which otherwise confer jurisdiction upon a judicial forum to hear such claims. See Gilmer v. Interstate/Johnson Lane Corporation, ___U.S.___, 111 S. Ct. 1647 (1991) [hereinafter "Gilmer"]; McMahon, supra; Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) [hereinafter "Mitsubishi"]. This case concerns the relationship between the strong mandates of the FAA and the courts' power to enforce their own judgments. Simply put, this case presents an opportunity for the Court to address an important analogue to the issues

determined in Gilmer, McMahon and Mitsubishi, i.e., whether the FAA also requires the arbitration of claims founded upon rights arising from court-approved settlements and judgments (in class actions or otherwise) which otherwise confer jurisdiction upon a judicial forum to hear such claims (most often the approving court) in situations where a party contractually submits the determination of such rights to an arbitral forum.

Here, the Ninth Circuit, determining McMahon and Mitsubishi to be "inapposite to the case before us," App. A-21-22, agreed with the District Courts and, we respectfully submit, erroneously held that a party's written submission to arbitration of rights arising from court-approved settlements and consent judgments

has "no effect on a District Court's ability to enforce its judgment to prevent relitigation of claims, even in arbitration." App. A-12-13. This case therefore presents important federal issues as to the scope and applicability of the FAA which merits review by the Court.

Further, this case presents an opportunity for the Court to address the constitutional sufficiency of class action settlement notices which, on their faces, were confusing, misleading and just plain wrong as to the claim preclusion consequences that would be binding upon all absent class members who did not opt out of the class.

A. The Class Action Settlements

1. The Sullivan Action.

The original complaint in Sullivan was filed on or about August 28, 1989 (jurisdiction in the District Court was grounded upon 15 U.S.C. §§ 77v, 78aa and 28 U.S.C. § 1331), and concerned the purchase by the class members of interests in a limited partnership. The plaintiff class in Sullivan sued respondent Shearson Lehman Hutton, Inc. ("Shearson") and other defendants for alleged material omissions and misrepresentations in the prospectus and other sales documents which were issued by Shearson in connection with the offering of the limited partnership.

The settlement of the class action was approved by the District Court on July 16, 1990. The release given to the settling defendants as part of the class

action Settlement applied only to the "Settled Claims," which is defined in said settlement. The court order approving the settlement prohibited any member of the plaintiff class from prosecuting any claim "that is a Settled Claim (as that term is defined in the Settlement Agreement)."

The notice of class certification and proposed settlement in the class action -- which constitutes the only notice and explanation of the class action settlement that an absent class member ever received -- did not contain any explanation that the release covered or would cover any and all claims, known or unknown, against Shearson and could be invoked as a defense by a Shearson officer or agent that had no involvement with or connection to the subject of the class action. To the contrary, the settlement notice

specifically limited the extent of the release:

> By remaining a Class member, any claims against the defendants for damages arising from the defendants' conduct as alleged by the Class will be determined in this lawsuit and cannot be presented by you in any other lawsuit.

The settlement notice described the allegations of the class action as being directed to claims:

> arising out of the offer and sale of the Units of limited partnership interest in the Shearson California Radisson Plaza Partners, L.P. ("Units") . . . by way of [Shearson's] misrepresentations and omissions of material fact which concealed from purchasers important information regarding the operation and performance of the Radisson Plaza Hotel & Golf Course, and the potential profitability and true risks of the investment.

Ms. Greenblatt's decision not to opt out of the class action was grounded upon her reasonable reliance on the information

contained in the settlement notice, the only document she ever received concerning the terms of the Sullivan settlement and the consequences thereof.

2. The Hartley Action

The original complaint in the Hartley class action was filed on or about November 21, 1990 (jurisdiction was grounded upon 15 U.S.C. §§ 77v, 78aa and 28 U.S.C. § 1331), and concerned the purchase by the class of interests in another limited partnership.

The plaintiff class in the Hartley class action sued Shearson and other defendants for alleged material omissions and misrepresentations in the prospectus and other sales documents which were issued by Shearson in connection with the offering of the limited partnership.

The settlement of the Hartley action

was approved by the District Court and entered nunc pro tunc as of May 9, 1991. The release given to the settling defendants as part of the class action settlement applied only to the "Settled Claims," as defined in said settlement.

The court order approving the Hartley class action settlement prohibited any member of the plaintiff class from prosecuting any claim "that is a Settled Claim (as that term is defined in the Settlement Agreement)." The notice of class certification and proposed settlement in the class action -- which constitutes the only notice and explanation of the settlement that an absent class member ever received -- did not contain any explanation that the release covered or would cover any and all claims, known or unknown, against Shearson

and could be invoked as a defense by a Shearson officer or agent that had no involvement with the allegations contained in the class action complaint. To the contrary, the settlement notice specifically limited the extent of the release. The Hartley settlement notice provides as follows:

> By remaining a Class Member, any claims against the Defendants for damages arising from the Defendants' conduct as alleged by the Class Action Complaint will be determined in this lawsuit and cannot be presented by you in any other lawsuit.

The settlement notice described the allegations of the Hartley complaint as being directed to the following conduct:

> [D]efendant Shearson['s] services as a selling agent in connection with the offer and sale of the Units of limited partnership interest in the Stamford Towers Limited Partnership ("Units") as set forth in the Prospectuses for an aggregate sale of approximately

$78 million.

B. **The Arbitration**.

Pursuant to the arbitration provisions in her customers' agreements with Shearson, Greenblatt commenced her arbitration against Shearson and her Shearson broker Kenneth Silva (the "Arbitration") in late May 1991 in the National Association of Securities Brokers, Inc. ("NASD"). The arbitration included claims arising from Greenblatt's investments in the Sullivan and Hartley limited partnerships.[2]

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[2] In 1990, Greenblatt received and accepted a $1,370.67 reimbursement of her $100,000 investment with respect to the Sullivan settlement. In August 1991, Greenblatt received and accepted an approximately five percent (5%) reimbursement of her $400,000 investment with respect to the Hartley settlement. As her arbitration was already commenced at the time of her receipt of the Hartley check, she immediately notified Shearson that she considered this payment to be "without prejudice to my rights and claims

On September 20, 1991, Shearson, represented by counsel, filed an answer to Greenblatt's arbitration Statement of Claim. In its answer to the Statement of Claim (the "Arbitration Answer"), Shearson asserted the following defense:

> 22. The partnerships Radisson, Stamford Towers and Jidfy Lube are all subjects of class actions. Greenblatt is a member of each of the classes and therefore, cannot pursue any claims related to those partnerships in this lawsuit. Hartley v. Stamford Towers, L.P., No. C 90 2146 JPV (N.D. Calif. July 11, 1991); Sullivan v. Shearson California Radisson Plaza Partners, L.P., Case No. 89-5472-JMI (C.D. Calif. Aug. 28, 1989); Wolgin v. Shearson Lehman Bros. Capital Ptrs. I, et al., CA NO. 10972 (Del. Ch. Ct.).

In and before September 1991, when their Arbitration Answer was due, Shearson

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asserted by me in my arbitration against Shearson and Kenneth Silva [her Shearson broker]."

had every opportunity to move in the District Courts for the relief that it eventually sought there in August and October 1992. Instead, Shearson voluntarily and knowingly decided to submit for resolution in the Arbitration a motion to dismiss dated September 20, 1991, which was grounded on its class action settlement defense and sought enforcement in the Arbitration by the NASD of Shearson's purported rights under the Sullivan and Hartley settlements (the "Arbitration Motion"). The record shows that there were no legal or other impediments or constraints preventing Shearson from seeking such relief in the District Courts in or before September 1991. Neither Shearson's Arbitration Answer nor its Arbitration Motion reserves any right of Shearson to seek enforcement

of the Sullivan and Hartley class action settlements in the District Courts or any other judicial forum.

Indeed, Shearson's Arbitration Motion leaves no doubt that Shearson was explicitly asking the NASD to enforce its purported rights under the class action settlements in the Arbitration (and not reserving any right to seek enforcement in the District Courts):

> Respondents Shearson . . . and . . . Silva hereby move to dismiss Linda Greenblatt's claims relating to the [purchase] of [the limited partnerships] on the basis of the Final Judgment entered in the class [actions]. . . .
>
> Respondents respectfully request that the Director of Arbitration rule on this motion prior to it being transmitted to the Panel, alternatively Respondents request that this motion be transmitted to the Panel for determination before any evidentiary hearing on the merits. This motion is ripe for decision and a pre-hearing disposition (either by the Director or the panel) may shorten the hearing

> and limit the presentation of evidence.
>
> * * *
>
> For the reasons stated above, Respondents respectfully request that this [NASD] Panel dismiss Greenblatt's claims relating to her investments in [the limited partnerships].

Greenblatt opposed Shearson's Arbitration Motion. In a memorandum dated January 29, 1992, the NASD Director of Arbitration denied Shearson's request that its Arbitration Motion be granted prior to any evidentiary hearing on the merits and referred said motion to the NASD Panel.

Again, Shearson did not seek enforcement of the class action settlements in the District Courts. Instead, Shearson and Silva manifested their agreement to submit the entire matter in controversy to the NASD for arbitration -- including the class action

settlement defense -- by executing submission agreements. Shearson and Silva executed the submission agreements on February 7, 1992 and April 27, 1992, respectively, with full knowledge of the existence of the Sullivan and Hartley class action settlements and their rights thereunder. Both Shearson and Silva were represented by counsel at the time that they signed the submission agreements.

The submission agreements provide in pertinent part:

> The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim [and] answers . . . to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

App. A-60-67.

The submission agreements thus provide that Shearson and Silva have

contractually agreed to act "in accordance with the . . . . Code of Arbitration Procedure of the [NASD]." Section 6 of that Code provides:

> No party shall, during the arbitration of any matter, prosecute or commence any suit, action or proceeding against any other party touching upon any of the matters referred to arbitration pursuant to this Code.

The submission agreements do not exempt from submission to arbitration any issues raised in the pleadings filed in the Arbitration or in Shearson's Arbitration Motion. Moreover, because the submission agreements specifically submit to arbitration the "present matter in controversy" -- i.e., all the claims raised in Greenblatt's Statement of Claim and all defenses raised in Shearson's Arbitration Answer and Arbitration Motion -- Shearson and Silva expressly contracted

to submit their class action settlement defenses to the NASD panel for decision.

From on or about September 20, 1991 (when Shearson filed its Arbitration Answer and Arbitration Motion with the NASD) to August 7, 1992 (when counsel for Greenblatt was advised by Shearson's arbitration counsel that Shearson was moving in the District Courts for the same relief requested in the Arbitration Motion), Shearson and Silva fully participated in the Arbitration with respect to all issues raised by Greenblatt's claims. Shearson (i) submitted its class action settlement defenses to arbitration in September 1991 in its Arbitration Answer, (ii) litigated that issue in the Arbitration by its Arbitration Motion, (iii) then contractually reaffirmed its submission of

this issue to arbitration by its and Silva's execution of the submission Agreements in February and April 1992, and (iv) unconditionally and without reservation participated in the voluminous discovery in the Arbitration, including discovery concerning the Sullivan and Hartley limited partnerships.

At the time Shearson finally filed its motions to enforce that class action settlements in the District Courts in August and October 1992, the Arbitration was scheduled to commence on November 30, 1992.

C. **The District Courts' Orders**

On or about October 5, 1992, Shearson filed a motion in the Sullivan District Court, seeking a permanent injunction against Greenblatt's pursuit of her claims in arbitration relating to the Sullivan

limited partnership. On or about November 9, 1992, the District Court signed Shearson's proposed order, granting Shearson's motion.[3] App. A-37-50.

On or about August 10, 1992, Shearson filed a motion in the Hartley District Court, seeking a permanent injunction against Greenblatt's pursuit of her claims in arbitration relating to the Hartley limited partnership. On October 2, 1992, the District Court entered its Order, granting Shearson's Motion. App. A-29-36.

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[3] Two months earlier, however, the District Court specifically referred to Shearson's execution of the submission agreements as one of the bases for the District Court's finding that it was "not satisfied that Defendants have shown irreparable injury or probable success on the merits of the dispute" and denied Shearson's application for a Temporary Retraining Order against Greenblatt's pursuit of her Sullivan limited partnership claims in the Arbitration. App. A-51-59.

D. **The Ninth Circuit's Decision**

Greenblatt appealed, arguing that, inter alia, (i) Shearson, by written agreement, submitted its class action settlement defenses to arbitration and should be bound to arbitrate that issue pursuant to the FAA, and (ii) that in any event Greenblatt should not be bound to the Sullivan and Hartley class action settlements since the settlement notices in those actions violated due process by failing to provide adequate notice of the claim preclusion consequences of failing to opt out. The Ninth Circuit affirmed the District Courts. App. A-1-28.

The Ninth Circuit rejected Greenblatt's argument that the FAA mandated that Shearson's class action settlement defenses be determined in an arbitral forum. The court, determining

that McMahon and Mitsubishi were "inapposite to the case before use," App. A-21-22, that "the arbitration clauses in the Shearson's Clients Agreements and the NASD Submission Agreements have no effect on a District Court's ability to enforce its judgment to prevent relitigation of claims, even in arbitration."[4] Id. at A-12-13. The

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[4] The Ninth Circuit described the submission agreements as follows:

> Shearson and Silva executed form Submission Agreements, as required by the Code of Arbitration Procedure § 25(b), to proceed with the arbitration of Greenblatt's other claims. These agreements limited arbitration to 'the present matter in controversy, as set forth in the attached statement of claim and answers. . . . '

App. A-10-11 (emphasis supplied).

Neither the face of the submission agreements, id. at A-60-67, nor any thing else in the record support the courts' construction of the submission agreements

court further held that "Shearson's participation in the arbitration process cannot affect the District Court's authority to enforce its judgments."[5] Id. at A-18.

The Ninth Circuit also rejected Greenblatt's constitutional challenge to the Sullivan and Hartley notices of class settlement, holding that said notices were

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as excluding (or intending to exclude) Greenblatt's claims concerning the Hartley and Sullivan limited partnerships or Shearson's defense thereto based on the class action settlements.

The court also erred in characterizing Greenblatt's arbitration claims as seeking over $17 million in damages. Id. at A-14 n.1. There is nothing in the record to support the court's statement. Indeed, Greenblatt's statement of claim specificly seeks damages exceeding $3.5 million.

[5] In light of its holdings, the court noted that "Shearson could have waited for the ruling from the arbitration panel on the question of arbitrability before returning to district court to enforce the injunctions. . . . " App. at A-20.

"constitutionally adequate. . . . " Id. at A-25.

Greenblatt now petitions this Court to review the Ninth Circuit's decision, which contravenes the FAA by establishing an exemption therefrom with respect to rights based on court-approved settlements or court judgments which confer jurisdiction upon a judicial forum to hear such claims.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONTRAVENES THE FAA BY EXEMPTING SHEARSON'S CLASS ACTION SETTLEMENT DEFENSES FROM ARBITRATION

A. The Ninth Circuit Applied An Incorrect Standard Of Review

The Ninth Circuit reviewed the District Courts' Orders under an abuse of discretion standard. App. at A-12.

However, questions concerning the arbitrability of claim preclusion defenses

such as Shearson's class action settlement defenses concern, inter alia, the scope of arbitration agreements. Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067, 1069 (11th Cir.), cert. denied, ___U.S.___, 114 S. Ct. 600 (1993); Atsa of California, Inc. v. Continental Insurance Co., 702 F.2d 172, 175 (9th Cir. 1983), amended, 754 F.2d 1394 (9th Cir. 1985), thereby rendering the de novo standard appropriate. In any event, most of the facts at issue are undisputed. Under these circumstances, "an appellate tribunal has broad authority to substitute its own conclusions of law for those of the trial court." Miller Brewing Co. v. Fort Worth Distributing Co., 781 F.2d 494, 496 (5th Cir. 1986); see also Bose Corporation v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 (1984) (the

clearly erroneous standard "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact").

B. The Legal Standard For Determining Arbitrability

The Court has repeatedly held that "[t]he Arbitration Act . . . established a 'federal policy favoring arbitration'. . . . , requiring that 'we rigorously enforce agreements to arbitrate.'" McMahon, 482 U.S. at 226. The Court has established a two-part test for determining whether a party's agreement to arbitrate will be enforced pursuant to the FAA: (i) whether an arbitration or submission agreement applies to a particular dispute, and, if so, (ii) whether legal constraints external to the

party's agreement foreclose the arbitration of those claims. See Mitsubishi, 473 U.S. at 628.

With respect to the first criterion, the Court has held as follows:

> '[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' . . . Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

Mitsubishi, 473 U.S. at 626.

Accordingly, the standard for establishing the arbitrability of a dispute is not a high one, Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 475 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1294 (1992), and arbitration may not be denied "unless it

may be said with positive assurance that an arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

The Court has held that "[t]here is no reason to depart from these guidelines where a party bound by an arbitration agreement raised claims founded on statutory rights," which otherwise confer jurisdiction upon a judicial forum to hear such claims. Mitsubishi, 473 U.S. at 626. Similarly, the presumption in favor of arbitration should not be diminished when, as here, a party contractually agrees to submit for resolution in a arbitral forum its rights under a class action settlement and judgment, which otherwise provide said party with the right to seek redress in a

judicial forum. Id. at 626-28; see also Gilmer, 111 S. Ct. at 1651-52; McMahon, 482 U.S. at 226-27.

Turning to the second criterion, the FAA mandates that a pre-dispute arbitration agreement or a post-dispute submission agreement "shall be valid, irrevocable, and enforceable," unless said agreement "resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" Mitsubishi, 473 U.S. at 627 (quoting 9 U.S.C. § 2).

With respect to a party's statutory claims which provide that party with a judicial forum and judicial remedies, the Court has held that "absent a well-founded claim" that would provide grounds for the revocation of the arbitration or submission agreement pursuant to section 2

of the FAA, "the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.'" McMahon, 482 U.S. at 226 (quoting Mitsubishi, 473 U.S. at 627).

The Court has explained:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute: it only submits to their resolution in a arbitral, rather than a judicial, forum. . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Mitsubishi, 473 U.S. at 628; see Gilmer, 111 S. Ct. at 1652.

Simply put, the FAA, standing alone, mandates the rigorous enforcement of all

agreements to arbitrate (subject to the contract defenses noted in section 2 of the FAA), and this mandate may only be overridden by a specific congressional command to the contrary. It should be of no legal significance whether the pertinent arbitration agreement encompasses statutory claims which would otherwise provide the protected party with a judicial forum or, as here, purported rights under Rule 23 class action settlements which would otherwise provide the protected party with a judicial forum to enforce those rights. See Gilmer, 111 S. Ct. at 1652; Mitsubishi, 473 U.S. 627-28. The Ninth Circuit, however, in holding McMahon and Mitsubishi to be inapplicable, erroneously refused to acknowledge that this case presents any FAA issues.

C. There Are No Legal Constraints Which Foreclose Arbitration Of Shearson's Class Action Settlement Defenses

The Ninth Circuit, in its decision, holds that the submission agreements "have no effect on the District Court's ability to enforce its judgment," that "Shearson's participation in the arbitration process cannot affect the District Court's authority to enforce its judgments," and that Shearson could have sought enforcement of the injunctions even after the issue was determined in arbitration. App. at A-12-13, A-18, A-20. In other words, the Ninth Circuit has crafted a judicial exemption to the binding mandates of the FAA which not only contravenes the paramount motive and intent of the FAA to compel courts to enforce arbitration agreements into which parties have entered, see Dean Witter Reynolds, Inc. v.

Byrd, 470 U.S. 213, 220 (1985), but has no basis in law.[6]

The fact that important federal interests may be conferred to the federal courts for protection and enforcement does not prevent a waiver of a party's right to seek judicial enforcement of those interests when that party enters into an arbitration agreement which encompasses the dispute. The reason for this rule is that by agreeing to arbitrate, "a party does not forgo the substantial rights afforded [to it]; it only submits to their resolution in an arbitral, rather than judicial, forum." Mitsubishi, 473 U.S. at 623.

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[6] The Ninth Circuit relied on SEC v. G.C. George Securities, Inc., 637 F.2d 685 (9th Cir. 1981), a case that did not concern arbitration and raised absolutely no arbitration related issues.

Because Shearson is not forgoing the rights afforded to it by the Sullivan and Hartley class action settlements and is merely submitting to the resolution of said rights in a arbitral (rather than a judicial) forum, the interests encompassed by the enforcement provisions of the class action settlements and the District Courts' interest in protecting their judgment are not seriously impaired. See Delta Air Lines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 582, 583-85 (11th Cir. 1983). Whatever other federal interests may allegedly be affected or impaired by the submission to arbitration of Shearson's class action settlement defenses are certainly not sufficient to preclude the arbitration of this issue. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. at 223 ("there is no reason to

require that district courts decline to compel arbitration . . . simply to avoid an infringement of federal interests"); see also Gilmer, supra; Mitsubishi, supra; McMahon, supra; Tai Ping Insurance Co. v. M/V Warschau, 731 F.2d 1141, 1143, 1146 (5th Cir. 1984) ("only the most exceptional circumstances will justify any action on the part of a federal court that serves to impede arbitration of an arbitrable claim").

With respect to the interplay between rule 23 of the Federal Rules of Civil Procedure and the FAA, no authority holds the FAA to be incompatible with any part of rule 23, including settlements approved under rule 23(e). Indeed, one court has recently rejected the argument that there is an "inherent conflict between the purposes of FED. R. CIV. P. 23 and the

Arbitration Act." Nielsen v. Greenwood, Fed. Sec. L. Rep. (CCH) ¶ 97,408, at 96,223, 96,226-27. (N.D. Ill. Feb. 26, 1993) (Rule 23 does not express a congressional intent to restrict arbitration of a class member's claim); see also Champ v. Siegel Trading Co., 1990 WL 19984 (N.D. Ill. Feb. 27, 1990).

Further, the Ninth Circuit's decision would defeat and render null and void the NASD's October 1992 amendment of section 12 of its Code of Arbitration Procedure, which was approved by the SEC. This amendment attempts to set forth a procedure by which disputes as to whether a claim submitted to arbitration "is encompassed by a putative or certified class action" can be resolved in a prompt and logical manner. Indeed, the amendment appears to be aimed at eliminating the

inefficient and unfair situation in which a party challenges the arbitrability of a claimant's arbitration claim based on a class settlement but participates in the arbitration before seeking a resolution of the arbitrability issue in a judicial forum.

Amended section 12(d)(2) provides that any claim filed by a member of a putative or certified class action is ineligible for arbitration "if the claim is encompassed by a putative or certified class action filed in federal or state court. . . . " Here, Greenblatt disputed that her arbitration claims concerning the Sullivan and Hartley limited partnerships were "encompassed" by the class action settlement. Amended section 12(d)(2) provides a clear procedure for the resolution of such disputes:

> Disputes concerning whether a particular claim is encompassed by a putative or certified class action shall be referred by the Director of Arbitration to a panel of arbitrators. . . . Either party may elect instead to petition the court with jurisdiction over the putative or certified class action to resolve such disputes. Any such petition to the court must be filed within ten business days of receipt of notice that the Director of Arbitration is referring the dispute to a panel of arbitrators.

In other words, amended section 12(d)(2), which has SEC approval,[7] clearly envisions that the questions of whether a claim "is encompassed by a putative or

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[7] "As the Supreme Court has recognized, the [SEC] has virtually plenary authority over the arbitration procedures adopted by the national securities exchanges and securities associations," Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 286 (9th Cir. 1988) (citing McMahon, 482 U.S. at 233-34), and "the SEC has specifically approved the arbitration procedures of . . . the NASD, the organization mentioned in the arbitration agreement at issue in this case." McMahon, 482 U.S. at 234.

certified class action" -- i.e., whether the claim is arbitrable -- shall be properly submitted to and decided by the arbitration panel if a petition to the appropriate court for a resolution of this issue is not made within "ten business days of receipt of notice that the Director of Arbitration is referring the dispute to [the] panel of arbitrators." The Ninth Circuit's decision eviscerates this SEC approved amendment.[8]

The Ninth Circuit's decision, allowing a party to the arbitration an unfettered and absolute opportunity to seek enforcement of its rights under a

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[8] Under amended section 12(d)(2), Shearson would be prohibited from seeking enforcement of the Sullivan and Hartley settlements in the District Courts because it failed to do so within "ten business days of receipt of [NASD's January 29, 1992] notice that the Director of Arbitration [was] referring the dispute to the panel of arbitrators."

class action settlement in the District Court, is inherently unfair and unworkable in the context of securities disputes where, as here, the customer is usually bound by the Client Agreement with the broker to submit all of his or her claims against the broker to arbitration. Such a rule would permit the broker, as Shearson did here, to submit to and participate in the arbitration of this issue until, at a time of its own choosing, it decides unilaterally to remove this issue to a judicial forum. Needless to say, the absurdity and unfairness of the result sanctioned by the Ninth Circuit is apparent. See Halley Optical Corp. v. Jagar Int'l Marketing Corp., 752 F. Supp. 638, 639-40 (S.D.N.Y. 1990) ("To find otherwise would allow a party to participate in an arbitration, with the

assurance that if it loses it may later challenge whether it had ever agreed to arbitration. Such a result is contrary to the clear policy favoring arbitration.").

Accordingly, because there are no constraints external to the pertinent arbitration and submission agreements here which bar the arbitration of Shearson's class action settlement defenses, the Ninth Circuit erred in affirming the Orders of the District Courts.

D. The Ninth Circuit Erred In Holding That Shearson Had Not Agreed To Submit To The Resolution Of Its Class Action Defenses In the Arbitration

The Ninth Circuit ignored both the law as enunciated by the Court and the indisputable facts in concluding that the submission agreements executed by Shearson and Silva -- which were entered into after entry of the class action settlements -- excluded Greenblatt's claims concerning

the Sullivan and Hartley limited partnerships and Shearson's defenses thereto. App. at A-10-11.

This Court has held that parties may submit questions pertaining to the arbitrability of a dispute to the arbitrators for determination. AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986). Indeed, in a case involving the claimed submission to arbitration of a class action settlement defense similar to Shearson's defense here, the Seventh Circuit stated that "[a]rbitrators possess to power to decide whether earlier decisions preclude new claims."[9] Matter

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[9] In the VMS case, the Seventh Circuit held that the District Court was nonetheless the proper forum to enforce said settlement rights since the class action settlement in that case abolished the appellant's previously obtained arbitration rights. 26 F.3d at 51. Here,

of VMS Ltd. Partnership Securities Litigation, 26 F.3d 50, 51 (7th Cir. 1994).

"Ultimately, the issue of arbitrability 'is to be determined by the contract entered into by the parties.'" Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1463 (9th Cir. 1983) (quoting Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers Int'l (AFL-CIO), 370 U.S. 254, 256 (1962)); see also Trade & Transport, Inc. v. Natural Petroleum Charters Inc., 931 F.2d 191, 195 (2d Cir. 1991) ("the submission by the parties determines the scope of the arbitrator's

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however, Shearson, by the submission agreements, determined and agreed to submit its defenses to arbitration well after the settlement agreements were executed and with full knowledge of its rights thereunder.

authority"). "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Mitsubishi, 473 U.S. at 626. "Thus, as with any contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." Id; see also Reyes Compania Naviera, S.A. v. Manumante, S.A., 649 F. Supp. 789, 792 (S.D.N.Y. 1986) ("'the parties' intention to arbitrate [can] be determined not only by the initial arbitration clause, but also by the text of the submission agreement'") (quoting Island Creek Coal Sales Co. v. Indiana-Kentucky Electric Corp., 366 F. Supp. 350, 353 (S.D.N.Y. 1973)).

Here, the plain language of the submission agreements does not exclude

Greenblatt's claims relating to the Sullivan and Hartley limited partnerships or Shearson's class action settlement defenses pertaining thereto. Indeed, Greenblatt's claims and Shearson's defenses are clearly and dispositively encompassed by those contracts which expressly submit to arbitration the "present matter in controversy." At the time of Shearson's and Silva's execution of the submission agreements February and April 1992 respectively, the "present matter in controversy" clearly included the class action settlement defense contained both in Shearson's Arbitration Answer and Shearson's Arbitration Motion to Dismiss (which had been referred to the arbitration panel on January 29, 1992 by the NASD Director of Arbitration). Simply put, at no time until its motions in the

District Courts were filed in August and October 1992 did Shearson qualify in words or deeds its submission to arbitration of its class action settlement defenses.

The Ninth Circuit's decision therefore failed to account for the strong federal policies underlying the FAA and ignored the rules of construction enunciated by this Court with respect to arbitrability issues.

II. THE SETTLEMENT NOTICES IN SULLIVAN AND HARTLEY WERE CONSTITUTIONALLY DEFECTIVE AND VIOLATIVE OF DUE PROCESS SINCE THEY FAILED ADEQUATELY TO APPRISE GREENBLATT OF THE CONSEQUENCES OF FAILING TO OPT OUT

The Sullivan and Hartley class actions were brought and certified pursuant to, inter alia, rule 23(b)(3). Accordingly, class members such as Greenblatt were entitled to "the best notice practicable under the

circumstances." Fed. R. Civ. P. 23(c)(2). Here, the class action notices -- the only documents ever sent to or received by Greenblatt and other absent class members concerning the class settlements -- clearly failed to explain in clear and unequivocal language that by failing to opt out of the class, a class member would be releasing and forever barred from raising any and all other claims that such class member might have concerning the subject limited partnerships. The Ninth Circuit erred in failing to hold said notices to be constitutionally infirm.

"Notice in a class suit must present a fair recital of the subject matter and proposed terms. . . . " Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1177 (9th Cir. 1977) (citing Eisen v. Carlisle and Jacqueline, 417 U.S. 156 (1974), and

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 396 (1950)). Because "important rights and remedies may be bargained away in the [class action] settlement process[,] . . . [adequate] notice of the settlement is necessary as a matter of constitutional due process -- an individual's claim cannot be extinguished without notice and an opportunity to be heard." Simer v. Rios, 661 F.2d 655, 664 (5th Cir. 1981), cert. denied, 456 U.S. 917 (1982) (citing, Mullane, 339 U.S. at 313-14).

In evaluating the adequacy of a class action notice, the Northern District of California has provided the following guidelines:

> [D]ue process demands that the options available to class members and the consequences of their election be detailed with sufficient clarity to afford absent members a realistic opportunity to evaluate

> alternative options available to them. See, Dole, 'The Settlement of Class Actions For Damages,' 71 Co. L. Rev. 971, 978 (1971).

McCubbrey v. Boise Cascade Home & Land Corp., 71 F.R.D. 62, 67 (N.D. Cal. 1976) (emphasis added); see also Man. Complex Litig. 2d, Part III, § 30.212 at 225 ("If the [settlement] agreement itself is not distributed [with or in the notice], the notice must contain a clear, accurate description of the key terms.").

Courts have upheld or given approval to class notices which have abided by this rule. See Richards Lumber & Supply Co. v. United States Gypsum Co., 545 F.2d 18, 20-21 (7th Cir. 1976), cert. denied, 430 U.S. 915 (1977) notice included "all the pertinent facts about the settlement in the class action including the text of the proposed covenant to sue"); In re VMS Securities Litigation, 145 F.R.D. 458, 460

(N.D. Ill. 1992) (class notice clearly and unequivocally informed class members that by not opting out they released defendants from "every asserted or potential claim that in any manner related to their purchase or sale of the VMS securities that were the subject of the class action"), aff'd, 21 F.3d 139 (1994); Bennett v. Behring Corp., 96 F.R.D. 343, 353 (S.D. Fla. 1982) (notice "specifically provided therein that copies of the complete settlement agreement with attachments be provided to each of the subdivisions affected thereby, and the court has received an affidavit attesting this was done"), aff'd, 737 F.2d 982 (11th Cir. 1984).

In In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977), the Fifth Circuit explained why adequate

notice of the "essential terms of a [class action] settlement" is so important to absent class members such as Ms. Greenblatt:

> Absentee class members will generally have had no knowledge of the suit until they receive the initial class notice. This will be their primary, if not exclusive, source of information for deciding how to exercise their rights under rule 23. Although absentee class members are customarily encouraged to make inquiry of the clerk of the district court where the case is filed if they have further questions, this worthwhile advice cannot justify omitting material information. This is particularly plain in a case such as the one at bar where class members are numerous and widely dispersed. Not only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class and be bound by the final judgment or opt out of the action. The standard then is that the notice required by [Fed. R. Civ. P. 23(c)(2)] must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment.

Id. at 1104-05 (footnote omitted).

The settlement notices here failed to satisfy the due process standards set forth above. With respect to the highly material information as to the consequences of not opting out of the class, the settlement notices thus were not "detailed with sufficient clarity to afford absent class members a realistic opportunity to evaluate alternative options available to them." McCubbrey, supra, 71 F.R.D.. at 67. Indeed, the information in the settlement notices concerning the claim preclusion effects thereof was erroneous and misleading, in that they informed absent class members that "[b]y remaining a Class Member" the only claims of that class member against the class defendants for damages that would be barred and precluded by the Class

Action Settlement were limited to those "arising from the Defendants' conduct as alleged by the Class Action Complaint."

The Sullivan settlement notice described the allegations of the Class Action Complaint as being directed to claims:

> arising out of the offer and sale of the Units of limited partnership interest in the Shearson California Radisson Plaza Partner, L.P. ("Units") . . . by way of [Shearson's] misrepresentations and omissions of material fact which concealed from purchasers important information regarding the operation and performance of the Radisson Plaza Hotel & Golf Course, and the potential profitability and true risks of the investment.

The Hartley settlement notice described the class defendants' conduct as alleged in the Class Action Complaint as "defendant Shearson'[s] services as a selling agent in connection with the offer and sale [of interests in the limited

partnership] as set forth in the Prospectuses for an aggregate sale of approximately $78 million."

Simply put, the notices given here were not "the best notice practicable under the circumstances," to which Greenblatt was entitled. To the contrary, they created, at the very least, a material ambiguity as to the scope of the release and res judicata effect of the class settlements (especially because Greenblatt's arbitration claims relating to the Sullivan and Hartley limited partnerships did not concern alleged misrepresentations in the offering or sales materials).

Needless to say, the deficiencies of the notices operate as a huge windfall for class action defendants such as Shearson since said deficient notices induce absent

class members not to opt out without adequately informing them that by remaining a class member they are releasing all claims that they have or might have concerning the subject limited partnerships. The magnitude of the constitutional deficiency of the notices here is apparent when one considers how easy it would have been for the notices to explain fully and adequately what were the actual res judicata consequences of remaining a class member. See e.g., In re VMS Securities Litigation, 145 F.R.D. at 460; see generally McCubbrey v. Boise Cascade Home & Land Corp., 71 F.R.D. at 67.

CONCLUSION

Petitioner Linda M. Greenblatt respectfully requests this Court to grant her petition for writ of certiorari,

reverse the Ninth Circuit's decision and vacate the orders of the lower courts.

Dated: November 23, 1994

Respectfully submitted,

ELLEN B. FRIEDLAND
Counsel of Record
DAVID J. MOLTON
MOLTON & MEEKINS
750 Lexington Avenue
New York, New York 10022
(212) 838-1500

Attorneys for Petitioner
Linda M. Greenblatt

APPENDIX

FILED
AUGUST 26, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 92-16802

D.C. No. CV-90-02146-JFV

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR W. HARTLEY,	)
	)
Plaintiff,	)
	)
and	)
	)
LINDA M. GREENBLATT,	)
	)
Plaintiff - Appellant,	)
	)
vs.	)
	)
STAMFORD TOWERS LIMITED PARTNERSHIP,	)
	)
Defendant,	)
	)
and	)
	)
SHEARSON LEHMAN HUTTON INC.,	)
	)
Defendant - Appellee.	)

Appeal from the United States District Court for the Northern District of California John P. Vukasin, Jr., District Judge Presiding

ARMONCE SULLIVAN,	)
	)
Plaintiff,	)
	)
and	)
	)
LINDA M. GREENBLATT,	)
	)
Plaintiff - Appellant,	)
	)
vs.	)
	)
SHEARSON CALIFORNIA RADISSON PLAZA PARTNERS LIMITED PARTNERSHIP; SHEARSON LEHMAN COMMERCIAL PROP III INC.; SHEARSON LEHMAN HUTTON, INC.,	)
	)
Defendants - Appellees.	)

No. 92-56528

D.C. No. CV-89-05472-JM

MEMORANDUM*

Appeal from the United States District Court for the Central District of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

California James M. Ideman, District Judge Presiding

Argued and Submitted: February 1, 1994
Pasadena, California

Before: TANG, PREGERSON, and NOONAN, Circuit Judges.

OVERVIEW

Appellant Linda Greenblatt appeals the orders of two District Courts granting the motions of Appellee Shearson Lehman Brothers, Inc. The District Courts' orders enforce the judgments and previous injunctions regarding two class action settlements involving Shearson. Specifically, the orders enjoin Greenblatt from relitigating in arbitration her claims concerning investment in two of Shearson's limited partnerships, Stamford Towers Limited Partnership ("Stamford Towers") and Shearson California Radisson Plaza Partners Limited Partnership ("Radisson Plaza"), which were the subject of the class action suits. We have

jurisdiction pursuant to 28 U.S.C. § 1291. We Affirm.

BACKGROUND

1. The Radisson Class Action

A class action complaint was filed in the Central District of California against Shearson Lehman Brothers, Inc. on August 28, 1989 for claims arising from the purchase of units in the Shearson California Radisson Plaza Limited Partnership. The complaint alleged violations of §§ 11 and 12(2) of the Securities Act of 1933, violations of § 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5, common law fraud, negligent misrepresentation, and breach of contract. The complaint was based in part on alleged misrepresentation in the written prospectus and advertisements regarding the Radisson Plaza investment. The class was certified on March 14, 1990.

On June 7, 1990 a notice of class certification and proposed settlement was sent to all class members. The notice provided a summary of the causes of action alleged in the suit and the settlement agreement. The notice further suggested that class members seek the advice of counsel if they desired, and stated that class members were free to examine or photocopy the actual pleadings and records in the suit at any time. In addition, the notice informed all potential class members that they had a right to exclude themselves from the class by notifying class counsel of their choice to opt out of thr class, and stated the consequences of failing to opt out of the class. The notice also listed the time and place of the fairness hearing for approval of the final settlement, and informed class members that they had a right to attend

the hearing or submit written objections to the settlement.

The District Court gave final approval of the settlement and entered judgment on July 16, 1990. The settlement bound all plaintiff class members and Shearson, and enjoined all class members from further prosecution of any action based on any claim that was or could have been asserted against Shearson or its employees relating to the Radisson Plaza investment. The District Court's order reserved jurisdiction over all parties to enforce the settlement.

2. The Stamford Towers Class Action

A separate class action complaint was filed in the Northern District of California against Shearson on July 30, 1990, for claims arising out of the offer and sale of Stamford Towers Limited Partnership interests. The complaint

alleged violations of § 12(2) of the Securities Act of 1922, §§ 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934, as well as common law fraud, negligent misrepresentation, negligence, and unfair business practices under Cal. Bus. & Prof. Code § 17200.

On June 3, 1991 a notice of class certification and proposed settlement was sent to all class members, which included a list of each cause of action alleged in the suit. Like the notice in the Radisson Plaza suit, the Stamford Towers notice suggested that class members seek the advice of counsel if they desired, and stated that class members were free to examine or photocopy the actual pleadings and records in the suit at any time. Further, the notice informed all class members that they had a right to opt out of the class, and stated the consequences

of failing to opt out. The notice listed the time and place of the fairness hearing, and informed class members that they had a right to attend the hearing or submit written objections to the settlement.

The parties submitted the Settlement Agreement to the District Court, which approved and entered judgment on July 11, 1991. This settlement also bound all plaintiff class members and Shearson, and enjoined all class members from further prosecution of any action based on any claim that was or could have been asserted against Shearson or its employees relating to the Stamford Towers investments. The District Court's order also reserved jurisdiction over all parties to enforce the settlement.

3. The Arbitration

On May 20, 1991, Linda Greenblatt, a class

member, filed an action before the National Association of Securities Dealers, Inc. ("NASD") pursuing the arbitration of numerous claims against Shearson and Kenneth Silva, Greenblatt's broker at Shearson. Greenblatt's purchase of interests in Radisson Plaza and Stamford Towers. The "Client Agreements" between Greenblatt and Shearson required that disputes between Shearson and their clients be arbitrated.

Shearson's answer filed with the NASD specifically asserted that Greenblatt was precluded from pursuing "any claims related to [the Stamford Towers and Radisson Plaza] partnerships in this lawsuit" because Greenblatt was a class member in both class action suits. Shearson's answer further moved for dismissal of all renaining claims asserted in Greenblatt's statement of claims.

As a class member, Greenblatt did not file any objections, appear at either fairness hearing to challenge the settlements, or opt out of either suit pursuant to the notification which she received. Greenblatt cashed the settlement check for Radisson Plaza for $1,370.67, and the Stamford Tower settlement check for $23,168.64. Greenblatt cashed the Stamford Tower check with the endorsement: "without prejudice to my rights or claims asserted by me in my arbitration."

Because of the substantive questions of fact and law involved in the dispute, on January 29, 1992 Shearson's motion to dismiss was referred to a hearing before a panel of arbitrators, scheduled for November 30, 1992. In the interim, Shearson and Silva executed form Submission Agreements, as required by the

Code of Arbitration Procedure § 25(b), to proceed with the arbitration of Greenblatt's other claims. These agreements limited arbitration to "the present matter in controversy, as set forth in the attached statement of claim and answers . . . ." In addition, Shearson participated in discovery as part of the arbitration process.

Before the November hearing, Shearson filed motions in the Northern District of California on August 10, 1992 and in the Central District of California on October 5, 1992 to enforce the judgments of the two class actions against Greenblatt. The District Courts granted Shearson's motions, finding that Greenblatt's arbitration claims relating to the two limited partnership investments were precluded and enjoined.

ANALYSIS

We review the District Court's enforcement of a settlement agreement for an abuse of discretion. Wilkinson v. Federal Bureau of Investigation, 922 F.2d 555, 558 (9th Cir. 1991).

At the outset, we note that Greenblatt devoted an extensive portion of her briefs to the merits of arbitration as a method for dispute resolution. Further, Greenblatt frames the issue of whether Shearson agreed to arbitrate its class action settlement defense in terms of examination of the scope and validity of the arbitration clauses in Shearson's Client Agreements and the NASD Submission Agreements. While we certainly agree with Greenblatt's assertion that the law favors arbitration where the parties have agreed to arbitrate an issue, the arbitration clauses in the Shearson's Client Agreements and the NASD Submission

Agreements have no effect on a District Court's ability to enforce its judgment to prevent relitigation of claims, even in arbitration. See SEC v. G.C. George Securities, Inc., 637 F.2d 685, 687 (9th Cir. 1981). Thus, we find Greenblatt's various arguments regarding the scope and validity of the arbitration clauses to be facially without merit.

As the Northern District Court noted in its order, judgment in a class action binds all class members from bringing subsequent claims grounded in the same factual basis. Western Systems, Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992), cert. denied, 113 S. Ct. 970 (1993). Thus, we first examine whether the District Courts erred in finding that Greenblatt's claims against Shearson regarding the Stamford Towers and Radisson Plaza investments were precluded by the

class action settlements because of a dissimilarity between the claims raised in court as compared to those raised in the arbitration.

Greenblatt contends that the settlement releases apply only to the "Settled Claims" raided in each class action, which she interprets as being limited to the specific claims in each class action complaint. Further, she contends that the settlement releases cannot "immunize" Silva from his alleged wrongful conduct in handling her accounts.[1] We reject both of these arguments. As the Northern District Court noted, the settlement agreements to which

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[1] Greenblatt's claimed damages in arbitration of over $17 million resulted from almost 220 different investments, including the two limited partnerships at issue here. Damages from her investment in Stamford Towers "are only a relatively small aspect of the overall case against Shearson presented in Arbitration." (SER at 17.)

Greenblatt did not object clearly state that all class members are enjoined from pursuing claims, known or unknown, that could have been asserted against Shearson or its employees in the class action suit. This comports with the definition of "Settled Claims"[2] found within both

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[2] "Settled Claims" are defined in the Stamford Towers class action judgment as:
any and all existing causes of action or claims, known or unknown, that have been or could have been asserted by Plaintiffs against Defendants, based upon or related to investments in the Units of limited partnership interest in Stamford Towers Limited Partnership . . . including claims for breach of fiduciary duty, negligence, breach of contract, or any other alleged claim arising in connection with the development, construction and operation of the Partnership and its assets or as a result of , among other things, defendant Shearson Lehman Hutton, Inc.'s services as a selling agent in connection with the offer and sale of the Units of limited partnership interest in Stamford Towers Limited Partnership as set forth in the Prospectuses.

The Radisson Plaza class action

settlement agreements.

Moreover, we find no substantive difference between the basis for the class action suits and Greenblatt's claims asserted in arbitration. Both of the class actions and the arbitration dispute sought damages for alleged violations of various securities laws and claims grounded in common law fraud and negligence. Although the class action suits focused on material omissions and misrepresentations in offering and sales materials, the class actions and arbitration claims stem from identical factual grounds. Additionally, the fact that Silva was not involved in the material misrepresentations at issue in this class actions has no impact on the settlement releases barring claims against

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judgment defines Settled Claims in a substantially similar manner.

Shearson employees. The releases apply to all Shearson employees who were in any way involved in the matters at issue.

Further, Greenblatt's failure to exercise her right as an individual to pursue the Stamford Towers claim against Shearson by opting out of the class action could not be cured by her notation on the settlement check. The Northern District Court properly found that Greenblatt's endorsement on the cashed check was an invalid attempt to permit her to further pursue the Stamford Towers claim in arbitration.

Greenblatt also contends that the District Courts are precluded from enforcing the class action settlements against her because Shearson participated in the arbitration process. We disagree for several reasons.

First, as noted above, federal

district courts have broad injunctive powers to protect their own judgments. 28 U.S.C. § 1651. This grant of authority includes jurisdiction to enforce a class action judgment. See SEC v. G.C. George Securities, Inc., 637 F.2d at 687. Here, the District Courts expressly reserved this right: the orders permanently enjoin class members from instituting or further prosecuting any action or proceeding in any court or tribunal of this or any other jurisdiction based upon any claim that is a Settled Claim. Thus, Shearson's participation in the arbitration process cannot affect the District Court's authority to enforce its judgments.

Second, Shearson's participation in the arbitration of Greenblatt's claims, absent Shearson's express or implied waiver, cannot waive the releases granted by the District Courts in the class action

judgments. "A party's efforts to alert an arbitration panel to its lack of jurisdiction over some of the claims before it is not a waiver of that party's substantive right to have a federal court determine the scope of the arbitrator's jurisdiction." Edward D. Jones & Co. v. Daniel Sorrels, 957 F.2d 509, 514 n.7 (7th Cir. 1992). Nor do we find law to support Greenblatt's contention that Shearson's participation in general discovery in the arbitration process waived its substantive right to seek dismissal. Although Greenblatt is correct that an agreement to arbitrate may be implied from the conduct of a party who has participated in the arbitration process, Fortune, Alsweet, & Eldridge, Inc., 724 F.2d 1355, 1356 (9th Cir. 1983), Shearson objected to the arbitrability of Greenblatt's Stamford Towers and Radisson claims from the

beginning of the arbitration process. As this Court has noted, a party may preserve the question of arbitrability of certain issues while proceeding with the arbitration process so long as the party expressly made the objection before the arbitrator. Van Waters & Rogers Inc. v. Local Union 70, 913 F.2d 736, 740-41 (9th Cir. 1990).

Although Shearson could have waited for the ruling from the arbitration panel on the question of arbitrability before returning to district court to enforce the injunctions, Shearson chose not to do so.[3] The arbitration panel never ruled on Shearson's motion to dismiss or exclude

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[3] We also disagree with Greenblatt's characterization of Shearson's return to the District Court for enforcement of the settlement as "forum shopping." Shearson returned to District Court before receiving any ruling in arbitration. Shearson was not trying to avoid a loss in arbitration by seeking enforcement of the settlement releases.

the Stamford Towers and Radisson Plaza matters from arbitration. Following the Director of Arbitration's decision to refer the case to a panel of arbitrators, Shearson withdrew its motion and put the matter before the District Courts that had jurisdiction over the class action settlements. There was nothing improper, nor was any right waived, by Shearson first seeking dismissal of the settled claims in arbitration before seeking relief in the District Court. Thus, we find that Shearson properly preserved its objection to arbitration of the Stamford Towers and Radisson Plaza claims while proceeding with the remainder of Greenblatt's claims.

Third, we find Greenblatt's attempts to find support in Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987) and Mitsubishi Motors Corp. v.

Soler Chrysler-Plymouth, 473 U.S. 614 (1985) to be futile. These cases, which uphold the arbitrability of statutory claims, are inapposite to the case before us.

Fourth, Greenblatt contends that Shearson should be precluded from seeking enforcement of the settlement releases based on the doctrines of estoppel, laches, and waiver. To establish laches Greenblatt must show unreasonable delay by Shearson in pursuing its rights in court and, either acquiescence in the act about which Shearson complains or prejudice to Greenblatt resulting from the delay. Transworld Airlines, Inc. v. American Coupon Exchange, Inc., 913 F.2d 676, 696 (9th Cir. 1990).

We find that Shearson did not acquiesce to arbitration of the Stamford Towers or Radisson Plaza claims or waive

its right to pursue the issue in court by proceeding in the arbitration process. As we noted above, the arbitration focused on the great bulk of Greenblatt's other claims. Shearson has consistently asserted that the two class action claims are barred by the settlement agreements.

Nor do we find that Shearson unreasonably delayed in pursuing this matter in District Court. Shearson bought this matter to the Court's attention several months before beginning the arbitration process and before the arbitration panel made a finding on this issue.

Moreover, we find disingenuous Greenblatt's assertion that she has been prejudiced because she "structured her case and planned her discovery" in reliance on the inclusion of the Stamford Towers and Radisson Plaza claims. We fail

to see how Greenblatt would have to "change her arbitration strategy" if she is enjoined from pursuing these claims when these claims relate to only two of seven limited partnership investments, eighty-nine municipal bond transactions, and ninety-three stock trades at issue. Even Greenblatt described the class actions claims as "a relatively small aspect of the overall case . . . ." As the Northern District Court pointed out, "Shearson raised this issue in arbitration in September, 1991, thus putting Greenblatt on notice." Therefore, we find any prejudice to be of Greenblatt's own making.

Finally, Greenblatt argues that, even if Shearson is not precluded from seeking enforcement of the settlement releases in District Court, we should reject Shearson's defense because the settlement

notices failed to adequately inform Greenblatt of the consequences of not opting out of the class actions and were thus constitutionally defective. We reject this argument as well.

Notice for the approval of a class settlement by class members only fairly apprise them of the subject matter of the suit, the proposed terms of the settlement, and the members' opportunity to be heard. Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1177 (9th Cir. 1977). Thus, notice may contain only a "very vague description" of the proposed settlement. Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

We find that the notices were constitutionally adequate and thus satisfied due process. Both District Courts approved the notices, which listed

the causes of action for each suit. The notices also stated that all claims against Shearson and its employees relating to the two partnership investments would be released. Further, the notice informed the class members of their right to opt out, seek further advice from counsel, or further review the terms of the settlement agreements or any other pleadings. Finally, the notices provided the date and time of the settlement hearings for each case.

Greenblatt argues that she did not fully understand the import of the notices because she is an unsophisticated investor. We must reject this contention as well. The record indicates that Greenblatt has an extensive history of investment involvement and the financial resources to obtain professional advice on these matters. In addition, Greenblatt

was aware of her claims against Shearson at least by the time she received the Stamford Towers notice because she had already retained counsel and filed her arbitration dispute against Shearson one month earlier. Yet Greenblatt did not opt out of the Stamford suit, examine the class action pleadings or object to the settlement; rather, she cashed her settlement checks.

In sum, on the facts before us we find that neither District Court erred in permanently enjoining and barring Greenblatt from further arbitrating any claims against Shearson or its employees which are based on or related to investments in either the Stamford Towers Limited Partnership or the California Radisson Plaza Partners Limited Partnership. When an individual is properly noticed as a class member,

chooses not to opt out of the class, and accepts the settlement payment, she must abide by the complete terms and spirit of the releases of claims contained in the judgment.

WE AFFIRM.

ORIGINAL FILED
OCTOBER 2, 1992

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA

No. C-90-2146-JPV

ORDER GRANTING DEFENDANT SHEARSON LEHMAN'S MOTION TO ENFORCE JUDGMENT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ARTHUR W. HARTLEY, JOHN J. WHITE, RAYMOND M. KANE, RHETA D. STRONG and JANET L. BRIA, on behalf of themselves and all others similarly situated,	)
Plaintiffs,	)
v.	)
STAMFORD TOWERS LIMITED PARTNERSHIP; STAMFORD TOWERS, INC.; STAMFORD TOWERS DEPOSITARY CORP.; SHEARSON LEHMAN HUTTON, INC.; A. GEORGE KALLOP; WILLIAM M. KAHN; PAUL W. PERKINS; GARY D. GALLAGHER; PAUL W. PERKINS; GARY D. GALLAGHER; DEVON B. MacEACHRON; RICHARD D. VILLARI; and MICHAEL R. MILVERSTED,	)
Defendants.	)

INTRODUCTION

Defendant Shearson Lehman's Motion to

Enforce Judgment was scheduled to be heard on September 10, 1992. After a review of the briefs, this court considered it appropriate to submit the motion on the pleadings pursuant to Local Rule 220-1, and now GRANTS the motion.

BACKGROUND

On July 30, 1990, a class action complaint was filed against the defendants for claims arising out of the offer and sale of Stamford Towers Limited Partnership interests. The complaint alleged violations of § 12(2) of the Securities Act of 1922, violations of § 10(b) and 10b-5 of the Securities and Exchange Act of 1934, common law fraud, negligent misrepresentation, negligence, and unfair business practices under Cal. Bus. & Prof. Code § 17200. On May 20, 1991, the parties submitted to this Court a Settlement Agreement for approval. On

July 11, 1991, this Court approved and entered judgment on the settlement, binding on all plaintiff class members and the defendants. This Court's Order also enjoined all members of the class from further prosecuting any action based upon any claim that was or could have been asserted against the defendants related to investments in the Stamford Towers Limited Partnership, and reserved jurisdiction over all parties to enforce the settlement.

On May 20, 1991, Linda Greenblatt, a class member, filed an action with the National Association of Securities Dealers against defendant Shearson Lehman and Kenneth Silva, a Shearson Lehman broker seeking damages for conduct premised in part on Shearson's sale of limited partnership interests in Stamford Towers. Greenblatt's "Client Agreement" with

Shearson Lehman requires such disputes to be arbitrated.

In the arbitration proceeding on September 20, 1991 Shearson filed a motion to dismiss Greenblatt's claims arising from the Stamford Towers investments. Because of the legal and factual issues involved, the motion was referred to a hearing before a panel of arbitrators, scheduled for November 30, 1992.[1] Shearson Lehman then filed this motion to enforce judgment. In opposition, Greenblatt requests Rule 11 sanctions against Shearson.

DISCUSSION

Judgment in a class action binds all class members from bringing subsequent claims based upon the same factual

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[1] In the interim, Shearson has participated in the arbitration process regarding the other claims brought by Greenblatt.

predicate. "[W]here there is a realistic identity of issues between the settled class action and the subsequent suit, and where the relationship between the suits is at the time of the class action forseeably obvious to notified class members. . . the paramount policy of encouraging settlement takes precedence." TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 461 (2d Cir. 1982).

In this case, Greenblatt had received court-approved notice of the proposed class settlement and elected not to opt out of the class. Although Greenblatt cashed the settlement check with the notation "without prejudice to my rights or claims asserted by me in my arbitration," such an objection after judgment in a class action from which the claimant chose not to opt out has no validity. Furthermore, in the Settlement

Approval Order this Court enjoined class members from pursuing claims that could have been asserted in the class action. Greenblatt's arbitration claims relating to the Stamford Towers investments were therefore both precluded and enjoined.

Shearson has not waived this Court's ability to enforce its injunction by participating in the arbitration of Greenblatt's other claims. Shearson raised this issue in arbitration in September, 1991, thus putting Greenblatt on notice. Greenblatt cites no authority for the proposition that the preclusive effects of the settlement and the injunction may somehow be waived.

In its Order, this Court dismissed all claims against Shearson and its officers and employees. Greenblatt's Statement of Claim submitted to the arbitrator alleges that Kenneth Silva is

an officer of Shearson. Therefore, any claims which Greenblatt pursues against Kenneth Silva premised on the Stamford Towers investments are also barred. In light of this decision, Ms. Greenblatt is not entitled to requested sanctions under Rule 11.

ORDER

In accordance with the foregoing discussion, IT IS HEREBY ORDERED that:

1. The Defendant's Motion to Enforce Judgment is GRANTED.

2. Linda M. Greenblatt is hereby permanently enjoined and barred from further arbitrating any claims against Shearson or its officers and employees that are based on or related to investments in the units of limited partnership interests in the Stamford Towers Limited Partnership.

3. Greenblatt's request for Rule 11

sanctions is DENIED.

Dated: October 2, 1992

s/s J.P. Vukasin, Jr.
J.P. Vukasin, Jr.
United States District Judge

FILED
NOVEMBER 9, 1992

CLERK, U.S DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ROBERT H. LOGAN (57640)
DAWN M. SCHOCK (121746)
EMI A. MURPHY (144080)
KEESAL, YOUNG & LOGAN
A Professional Corporation
Catalina Landing - 310 Golden Shore
Post Office Box 1730
Long Beach, California 90801-1730
Telephone: (310) 436-2000

Attorneys for the Shearson Defendants (Enumerated Below)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 89-5472-JMI (Jrx)

ORDER GRANTING MOTION OF THE SHEARSON DEFENDANTS TO ENFORCE SETTLEMENT

Date: November 9, 1992
Time: 10:00 a.m.
Room: 5 (Hon. James M. Ideman)

ARMONCE SULLIVAN, on behalf of herself and all others similarly situated,

Plaintiff,

vs.)
)
SHEARSON CALIFORNIA RADISSON)
PLAZA PARTNERS LIMITED)
PARTNERSHIP, et al.,)
)
Defendants.)
)
MANHATTAN BEACH HOTEL PROPERTIES,)
LTD., U.S. HOTEL PROPERTIES)
CORPORATION, HORST D. OSTERKAMP,)
)
Cross-Claimants,)
)
vs.)
)
SHEARSON CALIFORNIA RADISSON PLAZA)
PARTNERS, L.P., SHEARSON LEHMAN)
COMMERCIAL PROPERTIES III INC.,)
SHEARSON LEHMAN BROTHERS GROUP)
INC., SHEARSON LEHMAN HUTTON INC.,)
)
Cross-Defendants.)

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP RULE 77(d)

IT IS HEREBY ORDERED as follows:

1. On October 5, 1992, defendants SHEARSON CALIFORNIA RADISSON PLAZA PARTNERS, L.P., SHEARSON LEHMAN COMMERCIAL PROPERTIES III INC.,SHEARSON LEHMAN HUTTON INC., LINDA MILLER, ROBERT KELLEY, JAMES E. POWLESLAND, MARK D. POWERS, MICHAEL R.

MILVERSTED, DOUGLAS M. HARBAUGH, KENNETH BRADDOCK, ISABEL A. DEMPSEY, SHEARSON LEHMAN BROTHERS GROUP INC., and SHEARSON LEHMAN COMMERCIAL PROPERTIES DEPOSITARY III, INC. (the "Shearson Defendants") filed a Motion to Enforce Settlement with this Court. In said motion, the Shearson Defendants seek an order directing plaintiff class member LINDA M. GREENBLATT ("Greenblatt") to abide by the terms of the class action settlement reached in the above-referenced matter (hereafter the "Sullivan class action") and this Court;s July 16, 1990 Order and Judgment of Final Settlement Approval ("Final Order"), to withdraw her Radisson Claims from the National Association of Securities Dealers ("NASD") arbitration encaptioned Linda M. Greenblatt v. Shearson Lehman Brothers Inc. and Kenneth Silva, NASD No. 91-01644 (hereafter the "NASD arbitration"), and

permanently enjoining her from the continued prosecution of her Radisson Claims in arbitration.

2. On July 16, 1990, this Court gave final approval to the proposed settlement in the Sullivan class action and entered final judgment. (Final Order, attached as Ex. "E" to the Declarations of Dawn M. Schock, Susan Freelin and Brian F. McDonough (hereafter all references to exhibits will be found attached to those declarations). As part of the settlement, the Shearson Defendants agreed to pay $5.5 million to the class action settlement fund in exchange for a dismissal with prejudice and full release of all claims. (Settlement Agreement, Ex. "A"). This Court's Final Order dismissed with prejudice the class action and all of the claims asserted therein against the Shearson Defendants as well as, among

other releases, their past and present employees. (Final Order, ¶ 2, Ex. "E"). The Final Order further provided that the Settling Defendants were thereby "released and discharged from any and all liability under or based upon the Settled Claims," with "Settled Claims" being defined as "any and all causes of action or claims, known or unknown, that have been or could have been asserted by plaintiffs against the Settling Defendants, based upon or related to: (i) an investment in Radisson Securities. . . ." (Settlement Agreement, Ex. "A", p. 7, ¶ 8; Final Order, ¶ 2, Ex. "E"). The Final Order further contained a permanent injunction providing that all numbers of the settlement class were:

> . . . severally and permanently enjoined and barred from instituting or further prosecuting any action or proceeding in any court or tribunal of

this or any other jurisdiction based upon any claim that is a Settled Claim (as that term is defined in the Settlement Agreement), all of which claims are hereby declared to be released, discharged, compromised, settled and extinguished. (Final Order, Ex. "E", ¶ 3).

3. Although Greenblatt was given the opportunity to opt-out of the class in order to pursue any alleged individual claims, she chose to remain and accept the benefits of the $5.5 million settlement. (Ex. "B", ¶ 2 and attached Notice; Freelin Decl., ¶¶ 3, 5; Ex. "E" 1;23-27; and Exs. "I" and "J"). Greenblatt received and cashed her portion of the settlement proceeds. (Freelin Decl., ¶¶ 4-6 and Exs. "G" and "J").

4. On May 20, 1991, Greenblatt filed a settlement of claim with the National Association of Securities Dealers

("NASD"), naming Shearson Lehman Brothers Inc. ("Shearson") and its account executive, Kenneth Silva ("Silva"), as respondents and alleging in part Radisson Claims. (Ex. "K"). Shearson and Silva filed a response to the statement of claim, asserting as an affirmative defense the Sullivan class action settlement. (Ex. "L").

5. This Court expressly reserved jurisdiction over "all parties to the Settlement Agreement for the purpose of enforcement and administrating the settlement. . . ." (Final Order, ¶ 5, Ex. "E"). A federal court has jurisdiction to enforce a settlement agreement that was previously before it when it has expressly reserved such jurisdiction or it has issued an injunction. McCall-Bey v. Franzen, 777 F.2d 1178, 1188-90 (7th Cir. 1985); Ryan v. Dow Chem. Co., 781 F. Supp.

902, 915-16 (E.D.N.Y. 1991) (reconsid. granted in part, denied in pert. part). The court's jurisdiction to enforce the terms of a class action settlement agreement includes the power to enjoin further prosecution of settled claims in arbitration proceedings brought by class members. In re VMS Sec. Litig., 1992 W.L. 38379 (N.D. Ill. Feb. 21, 1992); Hartley et al. v. Stamford Towers Limited Partnership et al., case no. C-90-2146-JPV (N.D.Cal. October 2, 1992).

6. Greenblatt received and negotiated her portion of the class action settlement proceeds, and therefore ratified the class settlement and is estopped from now objecting to the settlement. Mungin v. Florida East Coast Ry. Co., 318 F. Supp. 720, 735 (M.D. Fla. 1970), aff'd, 441 F.2d 728 (5th Cir.), cert. denied, 404 U.S. 897 (1971).

7. The Radisson Claims in Greenblatt's NASD arbitration are based upon the same factual predicate as the claims asserted in the Sullivan class action. (Cf. Exs. "K", "B" (attached Notice, ¶ 1) and "A"). The Radisson Claims asserted by Greenblatt in her NASD arbitration are barred by the prior final judgment in this action and by the principles of res judicata. In re Cement Antitrust Litig., 688 F.2d 1297, 1309-10 (9th Cir. 1982), aff'd, 459 U.S. 1191 (1983). Res judicta bars Greenblatt's re-litigation of claims that could have been alleged in the class action as well as claims that were actually alleged. Mirin v. State of Nev. Ex. Rel. Pub. Serv. Comm., 547 F.2d 91, 94 (9th Cir. 1976), cert. denied, 432 U.S. 906 (1977); Vallerio v. Boise Cascade Corp., 80 F.R.D. 626 (N.D. Cal. 1978), aff'd, 645 F.2d 699

(9th Cir.), cert. denied, 454 U.S. 1126 (1981).

8. The Sullivan class action Settlement Agreement and this Court's July 16, 1990 Final Order, which binds Greenblatt as a class member, released the Shearson Defendants from any and all further liability for claims based upon or related to a class member's investment in units of interest in SHEARSON CALIFORNIA RADISSON PLAZA PARTNERS, L.P. ("Radisson Claims"). (Ex. "A", p. 7, ¶ 8; Ex. "E", ¶ 2). This release includes any investments made by Greenblatt and permanently enjoins and bars Greenblatt from any further prosecution of her Radisson Claims. (Ex. "E", ¶ 3).

9. The Radisson Claims asserted by Greenblatt in her NASD arbitration were expressly released in the Sullivan class action settlement. The Shearson

Defendants and Silva did not waive their right to enforce the class action settlement and this Court's Final Order on Greenblatt because they responded to her NASD statement of claim and asserted the class action settlement as an affirmative defense. As a member firm and an associated person subject to the NASD rules and by-laws, Shearson and Silva were obligated to respond to Greenblatt's statement of claim and participate in pre-arbitration discovery. Moreover, defending oneself in an arbitration proceeding does not waive one's right to seek a judicial determination that a matter was not properly before an arbitration tribunal in the first place. In Re VMS Sec. Litig., 1992 W.L. 38379 (N.D. Ill. Feb. 21, 1992), attached as Ex. "F"; Edward D. Jones & Co. v. Sorrels, 957 F.2d 509 (7th Cir. 1992); Hartley et al.

v. Stamford Towers Limited Partnership et al., case no. C-90-2146-JPV (N.D. Cal. October 2, 1992). Even if enforcement of the settlement agreement and this Court's Final Order could be waived, Greenblatt has not established that a waiver occurred and that she was prejudiced thereby. Outboard Marine Corp. v. Superior Court, 52 Cal. App. 3d 30, 41, 124 Cal. Rptr. 852 (1975); E.D. McGillicuddy Constr. Co. v. Knoll Rec. Ass'n, 31 Cal. App. 3d 891, 901, 107 Cal. Rptr. 899, 905 (1973); Page v. Moseley, Hallgarten, Esterbrook & Welden, Inc., 806 F.2d 291 (1st Cir. 1986).

10. This court finds that an award of the Shearson Defendants' attorneys' fees incurred in having to bring the instant motion is warranted based upon Greenblatt's inexcusable disregard of the class action settlement and this Court's

Final Order which included a permanent injunction barring class members, such as Greenblatt, from further litigating their Radisson Claims.

Accordingly, based upon the foregoing, this Court HEREBY ORDERS that:

11. Greenblatt is permanently enjoined and barred from instituting or further prosecuting any action or proceeding in any court or tribunal of this or any other jurisdiction, including her pending arbitration proceeding before the NASD, involving any claim based upon or related to her investment in units of interest in SHEARSON CALIFORNIA RADISSON PLAZA PARTNERS, L.P., pursuant to this Court's July 16, 1990 Order and Judgment of Final Settlement Approval in the case entitled Sullivan v. Shearson California Radisson Plaza Partners Limited

Partnership, et al., Case No. 89-5472-JMI (Jrx).

12. Greenblatt shall withdraw with prejudice any and all claims asserted in her pending arbitration before the National Association of Securities Dealers, Inc. entitled Linda M. Greenblatt v. Shearson Lehman Brothers, Inc. and Kenneth Silva, NASD Case No. 91-01644, based upon or related to her investment in units of interest in SHEARSON CALIFORNIA RADISSON PLAZA PARTNERS, L.P.

The Court will consider a properly noticed and filed motion by the Shearson Defendants for attorney's fees, which sets forth briefly the amount of fees requested and supporting materials.

Dated: November 9, 1992

s/s James M. Ideman
JAMES M. IDEMAN,
JUDGE OF THE UNITED STATES
DISTRICT COURT

FILED
AUGUST 27, 1992

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CV-89-5472-JMI (Jrx)

ORDER GRANTING DEFENDANTS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDERS AND ORDER SHORTENING TIME FOR HEARING ON PROPOSED MOTION

ORDER DENYING LINDA M. GREENBLATT'S REQUEST FOR SANCTIONS

ARMONCE SULLIVAN, on behalf of herself and all others similarly situated,

Plaintiff,

v.

SHEARSON CALIFORNIA RADISSON PLAZA PARTNERS LIMITED PARTNERSHIP, et al.

Defendants.

MANHATTAN BEACH HOTEL PROPERTIES, LTD., U.S. HOTEL PROPERTIES CORPORATION, and HORST D. OSTERKAMP,

Cross-Claimants,	)
	)
v.	)
	)
SHEARSON CALIFORNIA RADISSON PLAZA PARTNERS, L.P., SHEARSON LEHMAN COMMERCIAL PROPERTIES III INC., SHEARSON LEHMAN BROTHERS GROUP INC., and SHEARSON LEHMAN HUTTON INC.,	)
	)
Cross-Defendants.	)

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP RULE 77(d)

IT IS HEREBY ORDERED:

1. On August 14, 1992, Defendants SHEARSON CALIFORNIA RADISSON PLAZA PARTNERS, L.P., SHEARSON LEHMAN COMMERCIAL PROPERTIES III INC., SHEARSON LEHMAN HUTTON INC., LINDA MILLER, ROBERT KELLEY, JAMES E. POWLESLAND, MARK D. POWERS, MICHAEL R. MILVERSTED, DOUGLAS M. HARBAUGH, KENNETH BRADDOCK, ISABEL A. DEMPSEY, SHEARSON LEHMAN BROTHERS GROUP INC., and SHEARSON LEHMAN COMMERCIAL PROPERTIES DEPOSITARY III, INC.

[hereinafter "Shearson Defendants"] filed an Ex Parte Application requesting a Temporary Restraining Order and a hearing re permanent injunction. The Shearson Defendants seek to restrain Lanay Locher-Alvarez and Donald R. Alvarez [hereinafter "Alvarezes"] and Linda M. Greenblatt [hereinafter "Greenblatt"] from arbitrating issues allegedly settled in the above-named class action. In the alternative, the Shearson Defendants request an order shortening time for hearing on their proposed motion to enforce the July 16, 1990 Settlement Agreement in the above-named action [hereinafter "Settlement Agreement"].

2. The Settlement Agreement provides that "[t]his Court reserves jurisdiction over (a) implementation of the settlement and distribution of the Settlement Fund. . . . " Settlement

Agreement (dated July 16, 1990), at 4, attached as Exhibit E to Declarations of Dawn M. Schock, Susan Freelin, William Olshan, and Brian F. McDonough, Etc. [hereinafter "Schock Declaration"]. In addition, the Settlement Agreement "severally and permanently enjoined and barred" all class members who had not opted-out from instituting or further prosecuting any action or proceeding in any court or tribunal of this or any other jurisdiction based upon a "settled claim." Id. at 3.

3. Pursuant to Federal Rule of Evidence 201, the Court SUA SPONTE TAKES Judicial Notice of the following: (A) National Association of Securities Dealers, Inc. [hereinafter "NASD"] arbitration entitled Lanay Locher-Alvarez & Donald R. Alvarez v. Shearson Lehman Hutton, Inc. & Christopher Tara, NASD No.

91-02306, scheduled for hearing on September 2, 1992, see Exhibit N attached to Schock Declaration, (B) NASD arbitration entitled Linda M. Greenblatt v. Shearson Lehman Brothers, Inc. & Kenneth Silva, NASD No. 91-01644, scheduled for hearing on November 30, 1992, see Exhibit P Attached to Schock Declaration.

4. In the Ninth Circuit, "preliminary injunction relief is available to a party who demonstrates either (1) a combination of probable success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardship tips in its favor." Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 (1987) (citation omitted). "These two formulations represent two points on a sliding scale in which the required degree

of irreparable harm increases as the probability of success decreases." Id. (quotation and citation omitted).

5. Greenblatt, in her opposition to Defendants' Ex Parte Application, argues that the Shearson Defendants have not shown irreparable injury because the Greenblatt arbitration is not scheduled to commence until November 30, 1992 -- over three months from now. Greenblatt directs the Court's attention to a NASD determination that Shearson's Motion to Dismiss, which raises the issue of the res judicata effect of the Settlement Agreement, involves "substantive questions of fact and law" and is subject to the factual determination of the Panel of Arbitrators. See Exhibits B, D attached to Declaration of Holly J. Fujie in Support of Opposition to Defendants' Ex Parte Application, Etc. [hereinafter

"Fujie Declaration"] (filed Aug. 18, 1992.)

Moreover, Greenblatt directs the Court's attention to a Uniform Submission Agreement, executed on February 7, 1992, which discloses an agreement to submit to arbitration the entire controversy raised by Greenblatt's Statement of Claim. See Exhibit E attached to Fujie Declaration. This Court is not satisfied that Defendants have shown irreparable injury or probable success on the merits of the dispute, and HEREBY DENIES the Shearson Defendants' requests for a Temporary Restraining Order.

6. The Alvarezes did not file an opposition to Defendants' Ex Parte Application. Without expressing opinion on the issues of whether participation in arbitration proceedings constitutes a waiver of any right to stay those

proceedings, the Court notes that the Shearson Defendants have participated in the Alvarez arbitration for over one year.

Moreover, the Shearson Defendants' Answer to the Alvarez arbitration Statement of Claim provides that they "will file a separate motion to dismiss" the claims which the Alvarezes are allegedly barred from asserting due to their participation in the class action. See Answer, at 3-4, attached as Exhibit O to Schock Declaration. The Shearson Defendants' Ex Parte Application does not reveal the outcome or status of any such motion. Because the Court is not satisfied with the Shearson Defendants' showing of irreparable injury or probable success on the merits of the dispute, the Court HEREBY DENIES the Shearson Defendants' requests for a Temporary Restraining Order.

THEREFORE, the Court DENIES Defendants' Ex Parte Application for an order restraining the Greenblatt and Alvarez arbitrations, DENIES Defendants' request for an order shortening time for hearing on their proposed motion to enforce the Settlement Agreement, and HEREBY DENIES Greenblatt's request for sanctions. The Court will entertain a properly noticed and filed motion by the Shearson Defendants to enforce the Settlement Agreement.

IT IS SO ORDERED.

DATED: AUGUST 26, 1992

s/s James M. Ideman
JAMES M. IDEMAN
UNITED STATES DISTRICT JUDGE

NASD

National Association of Securities Dealers, Inc.
NASD Financial Center
33 Whitehall Street
New York, New York

UNIFORM SUBMISSION AGREEMENT

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Linda M. Greenblatt

91-01644

Name of Respondent(s)

Shearson Lehman Brothers, Inc.
Kenneth Silva

---

1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, cross claims and all related counterclaims and/or third party claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

2. The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s). The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, By-Laws, Rules, Regulations and/or NASD Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS HEREOF, the parties hereto have signed and acknowledged the foregoing Submission Agreement:

Party(ies) Signature

s/s Kenneth Silva
Kenneth Silva

FOR PARTIES WHO ARE INDIVIDUALS

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the 27th day of April, 1992, before me personally appeared Kenneth Silva to me known and known to me to be the person who executed the foregoing instrument, and he acknowledged to me that he executed the same.

s/s Tobius M. Simmons
Notary Public

Notary Stamp

FOR PARTIES WHO ARE CORPORATIONS

STATE OF _____)
) SS.:
COUNTY OF _____)

On the _____ day of _____, 19___, before me personally appeared _____ _____ to me known, who first being duly sworn by me, did depose and say that she is the _____ _____ _____ of _____ _____, the corporation described in and which executed the foregoing instrument, that she/he has full and complete authority to file and execute the said instrument and all papers contained here, in the name of and on behalf of the said corporation; that she knows the seal of said entity, that is was so affixed by order of the Board of Directors of the

said corporation; and that she signed her name thereto by like order.

_____

Notary Public

NASD

National Association of Securities Dealers, Inc.
NASD Financial Center
33 Whitehall Street
New York, New York

UNIFORM SUBMISSION AGREEMENT

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

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4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS WHEREOF, the parties hereto have signed and acknowledged the foregoing Submission Agreement:

Party(ies) Signature

s/s Shearson Lehman by Esther Koslow
Shearson Lehman Brother, Inc.

FOR PARTIES WHO ARE INDIVIDUALS

STATE OF _____)
) SS.:
COUNTY OF _____)

On the _____ day of _____, 19___, before me personally appeared _____ to me known and known to me to be the person who executed the foregoing instrument, and she/he acknowledge to me that she/he executed the same.

_____
Notary Public

FOR PARTIES WHO ARE CORPORATIONS

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On the 17th day of February, 1992, before me personally appeared Esther Koslow to me known, who first being duly sworn by me, did depose and say that she is the First Vice President and General Counsel of Shearson Lehman Brothers, Inc., the corporation described in and which executed the foregoing instrument; that she has full and complete authority to file and execute the said instrument and all papers contained here, in the name of and on behalf of the said corporation; that she knows the seal of said entity; that is was so affixed by order of the Board of Directors of the said

corporation; and that she signed her name thereto by like order.

s/s Ellen F. Schwarz
Notary Public

Notary Stamp

No. 94-949

Supreme Court, U.S.
FILED
DEC 28 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

LINDA M. GREENBLATT,

Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

LINDA M. GREENBLATT,

Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION OF RESPONDENTS AND PLAINTIFFS' CLASS COUNSEL TO PETITION FOR A WRIT OF CERTIORARI

JAMES M. FINBERG
Counsel of Record
ELIZABETH J. CABRASER
KAREN E. KARPEN
MORRIS A. RATNER
Sullivan and Hartley Plaintiffs' Class Counsel
LIEFF, CABRASER & HEIMANN
Embarcadero Center West
275 Battery St., 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Class counsel in the class actions of which Petitioner Linda M. Greenblatt was a class member oppose Greenblatt's Petition for a Writ of Certiorari. Class counsel submit this brief to correct Greenblatt's misrepresentations to the Court regarding the settlement notices in the underlying *Sullivan* and *Hartley* class actions. Class counsel also respond to Greenblatt's attempted assault on the integrity of all class action settlement notices where, as here, those notices comply with the applicable provisions of Federal Rules of Civil Procedure 23(c)(2) and satisfy the due process requirements set forth in well-established case law.

ARGUMENT

I. PETITIONER GREENBLATT MISCHARACTERIZES THE NATURE OF THE NOTICE PROVIDED TO HER, AND OMITS FACTS REGARDING HER CONSENT TO BE BOUND BY THE CLASS ACTION SETTLEMENTS

Greenblatt's sole contention regarding the adequacy of class notice is that the notice did not inform her of the consequences of failing to opt out. Specifically, Greenblatt asserts that the information in the settlement notices concerning the claim preclusion effects thereof was erroneous and misleading. Greenblatt can only make this factual assertion by distorting and/or ignoring key language in the settlement notices.

A. Greenblatt Mischaracterizes the Settlement Notices.

1. Petitioner Misrepresents the Text of the *Sullivan* Settlement Notice.

Greenblatt's Petition fails to inform the Court of the following provision in the *Sullivan* class settlement notice which clearly expresses the broad claim preclusion effects of participating in the settlement:

> If the proposed settlement is granted final approval by the Court, there will be no trial against the settling defendants, and the class members' claims against the settling defendants, *which relate to Shearson California Radisson Plaza Partners, L.P., will be dismissed with prejudice and released* in return for payment of $5.5 million into the Class Action Settlement Fund and other benefits as described in Paragraph 9. (ER 110, ¶ 6, emphasis added).

The additional claim preclusion portion of the *Sullivan* settlement notice which Greenblatt *does* cite is misleadingly misquoted. The *Sullivan* settlement notice states in paragraph 12(b) that "[b]y remaining a Class member, any claims against the defendants for damages arising out of the defendants' conduct as alleged by the Class will be determined in this lawsuit and cannot be presented by you in any other lawsuit." (ER 111, ¶ 12(b)). The *Sullivan* notice describes the Class claims as follows:

> Plaintiff ARMONCE SULLIVAN, on behalf of herself and all others similarly situated, filed a civil action against defendants . . . asserting claims for alleged violations of the federal securities laws . . . and claims for alleged common law fraud, negligence, and breach of contract,

> arising out of the offer and sale of the Units of limited partnership interest in the Shearson California Radisson Plaza Partners, L.P. ("Units"). (ER 109, ¶ 1).

In her Petition, Greenblatt tries to merge the above-quoted sentence with the sentence which follows it, misleadingly creating an entirely new sentence. Instead of ending the sentence at the period, Greenblatt, at page 57 of her Petition, adds an ellipsis, by which she attempts to append to the sentence a fragment of the following sentence, which reads: "Plaintiff alleges that these Units were offered and sold to the investing public by way of misrepresentations and omissions of material fact which concealed from purchasers important information. . . . "

By failing to inform the Court of broad claim preclusion language in Paragraph 6 of the *Sullivan* settlement notice, and by slicing and dicing those portions of the notice she *does* cite, Greenblatt attempts to mislead the Court into thinking that the *Sullivan* settlement notice claim preclusion provisions were limited to claims involving misrepresentations and omissions. In fact, the claims affected by the settlement notice explicitly relate to any claim "arising out of the offer and sale of the Units . . . " (ER 109, ¶ 1) or which "relate to Shearson California Radisson Partners, L.P." (ER 110, ¶ 6), and cannot reasonably be further limited.

2. Greenblatt Similarly Mischaracterizes the Text of the *Hartley* Class Settlement Notice.

Greenblatt's Petition fails to inform the Court of the following provision in the *Hartley* settlement notice

which broadly defines the *res judicata* effects of participating in the class action settlement: "If the proposed settlement is granted final approval by the Court, there will be no trial, and the Class Members' claims against the Defendants will be dismissed with prejudice and released. . . . " (ER 159, ¶ 5).

The *Hartley* settlement notice claim preclusion provision which Greenblatt *does* cite is misquoted. The *Hartley* notice states at Paragraph 11(b) that "[b]y remaining a Class member, any claims against the Defendants for damages arising from the Defendants' conduct as alleged by the Class Action Complaint will be determined in the lawsuit and cannot be presented by you in any other lawsuit." (ER 161, ¶ 11(b)). The notice describes those claims as "arising out of, *among other claims*, defendant Shearson Lehman Hutton, Inc.'s services as a selling agent . . . " (emphasis added). Greenblatt misleadingly excises from her quote in her Petition the phrase "among other claims." (ER 158-159, ¶ 1).

B. Greenblatt Fails to Apprise the Court of Key Facts Demonstrating Her Consent to Be Bound by the Class Settlements.

Although Greenblatt's Petition is silent on most of these points, there is no dispute on the record below regarding the following facts, all of which demonstrate Greenblatt's informed consent to be bound by the *Sullivan* and *Hartley* settlement notices:

(1) Class settlement notices were sent to Greenblatt, providing at least 30 days notice of the proposed settlements;

(2) The settlement notices apprised Greenblatt of the fact that claims relating to the class action complaints would be barred, and of her right to opt-out of the classes in order to preserve her claims (ER 109, ¶ 1; 110, ¶ 6; 111, ¶ 12; 158, ¶ 1; 159, ¶ 5; 161, ¶ 11).

(3) Greenblatt chose to remain a member of the settlement classes;

(4) Greenblatt chose not to attend the settlement approval hearings, or to appeal the settlements; and

(5) Greenblatt chose to cash the settlement checks.

Here, as in *In re Corrugated Container Litigation*, 643 F.2d 195, 222 (5th Cir. 1981):

> Plaintiffs had an opportunity to opt out of the class and litigate their state claims in state court; more pertinent, they knew that the settlement compromising class members' state claims had been negotiated before they were asked to opt out. Plaintiffs, however, wanted to participate in the class, share the fruits of the class' settlement negotiations, and still be free to litigate their [related] claims. In short, the objectors felt entitled to the bird in the hand while pursuing the flock in the bush. If the objectors felt they could do this, that was their prerogative but in doing so they accepted the risk that they would be precluded.

II. PETITIONER GREENBLATT'S ATTACK ON THE ADEQUACY OF THE SETTLEMENT NOTICES IS CONTRARY TO WELL-ESTABLISHED CASE LAW

A. The *Sullivan* and *Hartley* Notices Were Constitutionally Adequate, and Satisfied the Requirements of the Federal Rules of Civil Procedure.

The *Sullivan* and *Hartley* settlement notices met all of the standards of Federal Rule of Civil Procedure 23(c)(2), as well as the constitutional standards for notice that have been repeatedly discussed by the Ninth Circuit, other Circuits, and by this Supreme Court.

The Ninth Circuit Court of Appeals specifically held that the *Sullivan* and *Hartley* settlement notices were constitutionally adequate because they fairly apprised all class members of "the subject matter of the suit, *the proposed terms of the settlement*, and the members' opportunity to be heard" (emphasis added). In *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993), the court held that notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Id.*; *see also, Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977) (to be adequate, notice in a class action suit must merely "present a fair recital of the subject matter and proposed terms and give an opportunity to be heard to all class members").

The *Sullivan* and *Hartley* settlement notices met these requirements. Each of these notices generally described the status of the actions and the nature of the class action claims (ER 109, ¶ 1,2; ER 158-159, ¶ 1, 2); defined the

meaning and scope of class certification, including the claim preclusion effects of remaining a class member (ER 109-110, ¶ 3-8; ER 159-160, ¶ 3-7); described the terms of the settlement in detail (ER 110, ¶ 9; ER 160, ¶ 8); invited class members to be heard at the settlement approval hearing (ER 111, ¶ 10-11; ER 160, ¶ 9-10); presented in detail the class members' right to opt-out, and impact of failing to opt-out of the class (ER 111, ¶ 12; ER 161, ¶ 11); and generally addressed the rights and obligations of class members (ER 111, ¶ 13; ER 162, ¶ 12).

Finally, the notices specifically invited class members to contact Class counsel with questions regarding the notice, and to review the pleadings in the case (ER 111-112, ¶ 14, 16; 162, ¶ 13, 14), neither of which Greenblatt opted to do. The notices provided class members over 30 days in which to think about the contents of the notice, and decide whether to opt out.

In short, the notices were constitutionally adequate, and satisfied the requirements of the Federal Rules of Civil Procedure, and of Rule 23(c)(2) in particular. *See, e.g., Torrisi v. Tucson Elec. Power Co.*, 8 F.3d at 1373-75.

B. The Claim Preclusion Provisions of the Settlement Notices Were Constitutionally Adequate.

The Ninth Circuit Court of Appeals specifically rejected Greenblatt's arguments regarding the constitutional adequacy of the claim preclusion provisions of the class settlement notices. The Court of Appeals held:

> Finally, Greenblatt argues that, even if Shearson is not precluded from seeking enforcement of the settlement releases in District Court, we

> should reject Shearson's defense because the settlement notices failed to adequately inform Greenblatt of the consequences of not opting out of the class actions and were thus constitutionally defective. We reject this argument as well.

In cases involving nearly identical claim preclusion provisions, courts have repeatedly upheld the adequacy of class settlement notices. For example, in *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187 (8th Cir. 1993), the court affirmed the adequacy and enforceability of a class action settlement notice containing nearly identical claim preclusion provisions as the provisions in the *Sullivan* and *Hartley* settlement notices. *Id.* at 191.

In *Thompson*, the settlement notice stated that the settlement barred plaintiffs "from suing the Defendants for all claims that they have or may have in connection with the above-described . . . limited partnerships. . . . " *Id.* at 188. This notice was deemed adequate to bar a plaintiff's claims which the plaintiff, who participated in the settlement, claimed could not have been raised in a class context, and could only be brought on an individual basis. The court held: "Where there is a realistic identity of issues between the settled class action and the subsequent suit, and where the relationship between the suits is at the time of the class action foreseeably obvious to notified class members, the situation is analogous to the barring of claims that could have been asserted in the class action." *Id.* at 191 (citing and quoting *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982)).

Similarly, in *In re VMS Securities Litigation*, Fed. Sec. L. Rep. ¶ 97,301 (N.D.Ill. Feb. 20, 1992), the settlement notice made it clear that it barred any claims "arising out of, or in any way relating to any acts, facts, transactions, occurrences [or] representations" relating to the subject funds' securities. That notice is indistinguishable from the notice in the *Sullivan* and *Hartley* actions, which informed Greenblatt and other class members that by participating in the settlement, they would release any claims "arising out of the offer and sale of the Units. . . ." In *In re VMS Securities Litigation*, the court held that subsequent arbitration proceedings brought by class members who received notice of a proposed settlement and did not opt out of the class were barred by the prior class settlement, even though particular claims raised in the arbitration proceedings were not specifically covered in the class action complaint. *Id.*

CONCLUSION

With respect to the issue of adequacy of the *Sullivan* and *Hartley* class settlement notices, Petitioner Greenblatt has failed to establish a basis for granting her Petition for Writ of Certiorari. *See* Supreme Court Rules, Rule 10.1(a). As demonstrated above, Greenblatt's Petition misrepresents the nature of the settlement notices she received. In addition, the Ninth Circuit Court of Appeals' decision in *Hartley v. Stamford Towers Ltd. Partnership*, 1994 U.S. App. LEXIS 23543 (9th Cir. Aug. 26, 1994), affirming the adequacy of the notices provided to Greenblatt, comports with the decisions of other Courts of Appeals, and with

the United States Supreme Court. Accordingly, Greenblatt's Petition for Writ of Certiorari should be denied.

DATED: December 28, 1994

Respectfully submitted,

JAMES M. FINBERG
Counsel of Record
ELIZABETH J. CABRASER
KAREN E. KARPEN
MORRIS A. RATNER
Sullivan and Hartley
Plaintiffs' Class Counsel
LIEFF, CABRASER & HEIMANN
Embarcadero Center West
275 Battery St., 30th Floor
San Francisco, CA
94111-3339
Telephone: (415) 956-1000

(3)

No. 94-949

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

LINDA M. GREENBLATT,

Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,

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LINDA M. GREENBLATT,

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SHEARSON LEHMAN HUTTON, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN R. REESE
DONN P. PICKETT*
*Counsel of Record
KAREN KENNARD
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

Attorneys for Respondent

McCUTCHEN, DOYLE,
BROWN & ENERSEN
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Two district courts enforced class action settlement orders that barred a class member who chose to stay in the class and cash her settlement checks from prosecuting her dismissed class action claims in arbitration. The Court of Appeals held that the district court orders were not an abuse of discretion. Should the Court review the Court of Appeals' decision, given that:

(1) The decision does not conflict with any decision of any other federal circuit court or any state court of last resort;

(2) The decision raises no substantial federal issue;

(3) The decision is unpublished and may not be cited as precedent in the Ninth Circuit; and

(4) The legal issues sought to be reviewed are well-settled?

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

There is nothing to review here. It is well-settled that district courts have broad authority to enforce their own prior injunctions. It is also well-settled that class members who choose to accept a settlement payment rather than opt out of the class may not subsequently relitigate their settled class action claims in arbitration or any other forum.

In short, the legal issues raised by this case are not new or unsettled. There is no conflict between the decision below and any other federal or state decision. Nor is this unpublished decision important enough to merit review by this Court. The Petition should be denied.

STATEMENT OF THE CASE

1. The Radisson Plaza Class Action

On August 28, 1989, a securities class action was filed in the Central District of California against Respondent Shearson Lehman Hutton Inc. ("Shearson")[1] and others

[1] Pursuant to Supreme Court Rule 29.1, Shearson states that, after this litigation commenced, Primerica Inc. and Smith Barney, Harris, Upham & Co. ("Smith Barney") acquired the asset management and certain retail operations of Shearson Lehman Brothers Inc., formerly known as Shearson Lehman Hutton Inc. (excluding the retail operations of Lehman Brothers Inc.). Primerica Inc. merged subsequently with The Travelers Inc. The Travelers Inc., a public company whose shares are traded on the New York Stock Exchange, is the parent company of Smith Barney Holdings Inc., which in turn is the parent company of Smith Barney. Smith Barney has no subsidiaries

asserting claims arising from the purchase of units in the Shearson California Radisson Plaza Limited Partnership ("Radisson Plaza"). *Sullivan v. Shearson California Radisson Plaza Partners Limited Partnership, et al.*, Case No. 89-5472-JMI (*"Sullivan"*). The class action was based, in part, on alleged misrepresentations regarding the Radisson Plaza investment in the written prospectus and various advertisements. The complaint also alleged that Shearson and its selling agents misrepresented that Radisson Plaza was a safe and secure investment "appropriate for individual retirement accounts, pension and profit sharing plans and fixed income investors."

On May 31, 1990, District Judge James Ideman preliminarily approved a $5.5 million settlement of the class action, and approved the form of notice to be sent to all class members. In June 1990, notice of the proposed settlement was sent to Petitioner, who was a Radisson Plaza investor and a member of the class. The notice summarized the class action and the settlement, and listed each claim alleged in the case, which was generally described as "arising out of the offer and sale of the Units" in Radisson Plaza. The notice advised Petitioner that she could address any questions to class counsel, or could seek the advice of her own attorney. Most important, the notice informed Petitioner that she could examine the actual pleadings and records in the class action, including the complete Settlement Agreement, at any time.

The notice further informed Petitioner that she had a right to be excluded from the class, and warned her that,

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(other than wholly-owned subsidiaries).

if she remained a class member, she would benefit from *and be bound by* the results of the class action lawsuit:

> By remaining a class member, any claims against the defendants for damages arising from the defendants' conduct as alleged by the Class will be determined in this lawsuit *and cannot be presented by you in any other lawsuit*. . . .

Finally, the notice listed the time and place of the approval hearing, and informed Petitioner of her right to attend the hearing or submit written objections to the settlement.

Upon receiving this notice, Petitioner had two choices: agree to be bound by the settlement and collect her share of the settlement fund, thereby releasing all claims regarding her Radisson Plaza invesment, or opt out of the class and pursue her claims against Shearson on her own. She chose to take the money, and cashed Shearson's settlement checks for $1,370.

On July 16, 1990, Judge Ideman approved the settlement and entered final judgment. The judgment provided that Petitioner and the other class members were "severally and permanently enjoined and barred from instituting or further prosecuting *any action or proceeding in any court or tribunal* of this or any other jurisdiction based upon any claim that is a Settled Claim . . . all of which claims are hereby declared to be released, discharged, compromised, settled, and extinguished." "Settled Claims" were defined as:

> any and all existing causes of action or claims, known or unknown, that have been *or could have been* asserted by Plaintiffs against the Settling

> Defendants, *based upon or related to: (i) an investment in Radisson Securities, or (ii) the facts, transactions, events, occurrences, acts or omissions which relate to any of the matters alleged in the Radisson Actions.*

The Settlement Agreement defined "Settling Defendants" to include Shearson and its employees. Petitioner did not challenge the settlement or entry of judgment. Judge Ideman expressly retained jurisdiction to enforce the settlement and injunction.

2. The Stamford Towers Class Action

Two weeks later another securities class action was filed in the Northern District of California against Shearson, among others. *Hartley v. Stamford Towers Limited Partnership, et al.*, C-90-2146-JPV (*"Hartley"*). The class asserted claims arising from the purchase of Stamford Towers Limited Partnership units ("Stamford Towers"). Like *Sullivan*, the *Hartley* case was based, in part, on alleged misrepresentations regarding the Stamford Towers investment in the written prospectus, sales brochures, and oral "sales pitches." The class alleged that Shearson and its selling agents misrepresented Stamford Towers to be a secure investment "appropriate for investors seeking capital appreciation, cash distributions and investment safety."

In an order entered *nunc pro tunc* as of May 9, 1991, District Judge John Vukasin, Jr. preliminarily approved a $6.5 million settlement of the *Hartley* action, and approved the form of notice to be sent to class members,

including Petitioner, who was an investor in Stamford Towers and a member of the class.

3. The Arbitration

On May 20, 1991, a year after *Sullivan* was settled and nearly a year after *Hartley* was filed, Petitioner filed an arbitration proceeding with the National Association of Securities Dealers ("NASD") against Shearson and her Shearson broker, Kenneth Silva. Her arbitration claims involved almost 200 different investments, two of which were Radisson Plaza and Stamford Towers. Petitioner admits that her investments in Stamford Towers and Radisson Plaza represented a relatively small percentage of her total claimed damages in arbitration.

Like the *Sullivan* and *Hartley* complaints, Petitioner's arbitration complaint alleged violations of § 10(b) and Rule 10b-5, fraud, negligent misrepresentation, and negligence. Petitioner also alleged that her broker, Silva, advised her to invest in Stamford Towers and Radisson Plaza although the investments were not liquid and were excessively speculative. This allegation matches those made in *Sullivan* and *Hartley* that Shearson brokers misrepresented that these units were "appropriate" or "suitable" investments. Petitioner herself recognized the similarity, as her arbitration complaint alleges that her limited partnership investments were "financially distressed *and/or the subject of class action lawsuits.*"

One month after Petitioner filed her arbitration complaint, she received notice of the class action settlement in *Hartley*. Like the notice in *Sullivan*, the *Hartley* notice

summarized the class action and the settlement, advised Petitioner that she should address any questions to class counsel or consult her own attorney, and informed her of her right to see the pleadings in the case, including the full Settlement Agreement. The notice listed the causes of action alleged in the case, and described them as "arising out of, among other claims, [Shearson's] services as selling agent in connection with the offer and sale of the Units" in Stamford Towers.

The notice informed Petitioner of her right to be excluded from the class, and of the consequences of failing to opt out:

> By remaining a class member, any claims against the Defendants for damages arising from the Defendants' conduct as alleged by the Class Action Complaint will be determined in this lawsuit *and cannot be presented by you in any other lawsuit* . . .
>
> If you remain a member of the Class: *You will be bound by all further orders and judgments of the Court.*

Finally, the notice informed her of her right to attend the approval hearing or to submit written objections to the settlement.

Once again, Petitioner faced the choice of cashing her settlement check and releasing her claims, or opting out and pursuing her claims against Shearson. This time, however, she did not face that choice alone. When she received this notice, Petitioner was represented by her current counsel, and was actively pursuing her arbitration claims against Shearson. Yet she did not opt out of

the class, or object to the settlement. Instead, she cashed Shearson's settlement check for $23,168.[2]

On July 11, 1991, Judge Vukasin approved the settlement and entered final judgment. The judgment provided that Petitioner and the class were "severally and permanently enjoined and barred from instituting or further prosecuting *any action or proceeding in any court or tribunal* of this or any other jurisdiction *based on any claim that is a Settled Claim* . . . all of which claims are hereby declared to be released, discharged, compromised, settled and extinguished." "Settled Claims" were defined as:

> any and all existing causes of action or claims, known or unknown, that have been *or could have been* asserted by Plaintiffs against Defendants, *based upon or related to investments in the Units* of limited partnership interest in *Stamford Towers Limited Partnership* or the matters alleged in the Hartley action, including claims for breach of fiduciary duty, negligence, breach of contract, *or any other alleged claim arising in connection with* the development, construction and operation of the Partnership and its assets or as a result of, among other things, *defendant Shearson Lehman Hutton, Inc.'s services as a selling agent in connection with the offer and sale of the Units of limited partnership interest in Stamford Towers Limited Partnership* as set forth in the Prospectuses.

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[2] Petitioner's attempt to have it both ways by cashing her settlement check with an endorsement that it was without prejudice to her arbitration claims was judged to be an invalid objection to the settlement by the district court. Appendix, at A-33. Petitioner did not challenge this ruling on appeal.

The Settlement Agreement defined "Defendants" to include Shearson and its employees.

Again, Petitioner never challenged the settlement or appealed the judgment. Judge Vukasin expressly retained jurisdiction to enforce the settlement and injunction.

Although she had cashed Shearson's settlement checks in both *Sullivan* and *Hartley*, Petitioner continued to press her released Radisson Plaza and Stamford Towers claims in arbitration. Because her assertion of these claims in arbitration was in direct violation of the *Sullivan* and *Hartley* injunctions, Shearson timely answered the arbitration complaint on September 20, 1991, and simultaneously moved to dismiss the Radisson Plaza and Stamford Towers claims. In its Answer, Shearson expressly preserved its objection to the arbitrability of the Radisson Plaza and Stamford Towers claims. The Answer stated: "Greenblatt is a member of the classes and therefore, cannot pursue any claims related to [the Radisson Plaza or Stamford Towers limited partnerships] in this lawsuit."

While its motion to dismiss was pending, Shearson participated in the arbitration process with respect to Petitioner's other, non-released claims, which comprised the majority of her claimed damages. Appendix, at A-14 n.1.[3] As required by Code of Arbitration Procedure Section 25(b), Shearson and Silva executed form Submission

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[3] Citations in this brief to the Appendix submitted by Petitioner are designated as "App." followed by the page number. Citations to the Petition For Writ of Certiorari itself are designated as "Petition."

Agreements. The Submission Agreements contained a clear limitation on what was being submitted to arbitration: "the present matter in controversy, as set forth in the attached statement of claim *and answers*. . . . " App. A-60; A-64. Because Shearson expressly noted in its Answer that the Radisson Plaza and Stamford Towers claims were *not* arbitrable, the Submission Agreements did not submit those claims to arbitration.

The Director of Arbitration referred Shearson's motion to dismiss to a hearing before a panel of arbitrators, but several months went by without a panel being appointed. As the arbitration date approached, Shearson withdrew its motion without prejudice, and sought relief from the district courts.

4. The Orders Enforcing the Settlements

In August 1992, Shearson filed a motion to enforce the Stamford Towers judgment and enjoin Petitioner from relitigating her dismissed claims in arbitration. On October 5, 1992, the district court granted the motion. App. A-29. The court held that Petitioner, as a class member, was bound by the settlement and injunction. App. A-33. The court held that Shearson had not waived either its right, or the court's authority, to enforce the judgment and injunction by participating in the arbitration. App. A-34. In so ruling, the court noted that Shearson had asserted that the Stamford Towers claims were barred from the inception of arbitration. App. A-34. Accordingly, the court held that Petitioner was permanently enjoined

and barred from further arbitrating her Stamford Towers claims. App. A-35.

On October 5, 1992, Shearson filed a similar motion to enforce the *Sullivan* settlement and injunction.[4] On November 9, 1992, the court granted that motion. App. A-37. The court held that Petitioner chose to remain a class member, and had ratified the settlement by cashing Shearson's settlement checks. App. A-44. Finally, the court found that, by participating in the arbitration process, Shearson had not waived its right or the court's authority to enforce the *Sullivan* judgment and injunction. App. A-47. Accordingly, the court held that Petitioner was "permanently enjoined and barred" from arbitrating her Radisson Plaza claims. App. A-49.

5. The Appeal

Petitioner appealed both orders, and the Ninth Circuit affirmed. The court held that the district courts did not abuse their broad discretion to enforce their own judgments. App. A-12. It also upheld the findings that Shearson had not waived its right to seek judicial enforcement of the settlements, and that the settlement notices were adequate to fairly apprise class members of the nature of the suits, the terms of the settlements, and their opportunity to be heard. App. A-24-25.

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[4] Prior to filing its motion to enforce the settlement and injunction, Shearson filed an *ex parte* application seeking a temporary restraining order enjoining Petitioner's arbitration of her dismissed Radisson Plaza claims. The court denied the *ex parte* application, but expressly invited Shearson to submit a fully noticed motion to enforce the settlement agreement. App. A-59.

Petitioner did not seek rehearing by the Ninth Circuit. Instead, she seeks review by this Court.

SUMMARY OF ARGUMENT

The Court should refuse to grant review of this decision for these reasons:

1. Petitioner has made no showing that this unpublished decision meets the criteria for certiorari provided in Supreme Court Rule 10, nor could such a showing be made here. There is no conflict of decisions and no substantial federal question to review.

2. The legal issues raised by Petitioner are well-settled. The law is clear with respect to the preclusive effects of class action settlements, the adequacy of class notices, and the district courts' authority to enforce their own judgments and injunctions. Petitioner provides no legal authority to support her claim that she may pursue settled class action claims in arbitration after accepting the benefits of a class action settlement and releasing those claims. Indeed, both the Third and Eleventh Circuits have published decisions that reject Petitioner's position.

3. Even if the court below erred, this case does not merit review, because Petitioner's claims are indisputably precluded from arbitration regardless of the outcome here.

ARGUMENT

I. THIS CASE DOES NOT MEET THE CRITERIA FOR CERTIORARI UNDER SUPREME COURT RULE 10

Petitioner fails to present a single viable reason why this Court should review this case. Petitioner's only stated basis for seeking review is that the court below got it wrong. Of course, if that were a criterion for granting review, there would be no case that did not qualify, in the opinion of one of the parties.

However, that is not a criterion. Supreme Court Rule 10 provides a representative list of the types of cases this Court will consider on a writ of certiorari. None of those circumstances are present here. Nor has Petitioner even argued that they are, despite the fact that Supreme Court Rule 14(j) expressly requires a "direct and concise argument amplifying the reasons relied on for the allowance of the writ" pursuant to Rule 10.

The reason for Petitioner's omission of such a "direct and concise argument" is simple: This case does not meet any of the criteria for certiorari.

A. THERE IS NO CONFLICT IN DECISIONS

This case presents no split of authority between two federal appellate courts, or between a federal appellate court and this Court. Supreme Ct. Rule 10.1(a), (c). Indeed, the Third and Seventh Circuits have published opinions that directly support the Ninth Circuit decision here. In fact, Petitioner has not found a *single* federal decision, district court *or* appellate, that supports her position that class members who release their claims and

accept a settlement payment can later prosecute those released claims in arbitration.

Not only are there no *federal* cases that support Petitioner's position, there are no *state* court decisions that do. Thus, this case does not present any conflict between a decision of a state court of last resort and another state or federal appellate court. Supreme Ct. Rule 10.1(b).

B. THERE IS NO SUBSTANTIAL FEDERAL QUESTION TO REVIEW

Nor does this case present any "important question[s] of federal law which [have] not been, but should be, settled by this Court." Supreme Ct. Rule 10.1(c). Again, Petitioner does not claim this is such a case. Had she thought to make such a claim, however, she would have been wrong. Indeed, the court below did not find its decision important enough for publication. Ninth Circuit Rule 36-2(d).[5] As a result, it cannot be cited or relied on in the Ninth Circuit or any district court in that Circuit. Ninth Circuit Rule 36-2.

This case lacks significance for another reason. Even if this Court were to grant review and agree with Petitioner that the arbitrability of these claims should be decided by the arbitrators, rather than the district courts,

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[5] Indeed, the court below refused to publish the decision even after Shearson requested that it do so. In making its request, however, Shearson did not claim any important federal questions were involved. In fact, Shearson noted that the decision reinforced "established law," and, if published, would be important only because it would prevent the spurious relitigation of dismissed class action claims in arbitration.

her claims would still be precluded. Indeed, Petitioner never argues that her Stamford Towers and Radisson Plaza claims are *not* precluded by the class action settlements and injunctions. She simply argues that she did not *realize* they were precluded, and that the wrong people were allowed to tell her that her claims were barred.

Petitioner's whole argument seems to be that the *arbitrators*, not the district courts, should be allowed to tell her that she may not arbitrate her released class action claims. Petitioner concedes that amendments to the NASD Code of Arbitration Procedure, which became effective *after* the district court orders barring Petitioner's claims were issued, make it crystal clear that "[a]ny claim filed by a member or members of a putative or certified class action is . . . ineligible for arbitration at the Association if the claim is encompassed by a putative or certified class action filed in federal or state court." NASD Code of Arbitration Procedure, Section 12(d) (as amended October 28, 1992). Though these amendments were enacted too late to help Shearson, they presumably will apply to any proceeding before the NASD on remand. Thus, Petitioner's claims are precluded. Period. Accordingly, if there were an important federal question here, which there is not, this would not be the case to address it.[6]

Moreover, this rule also settles the issue for all future cases, so there is no need for the Court to act. The

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[6] Petitioner does not suggest, nor could she, Rule 10's other ground for review, that the courts here "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Ct. Rule 10.1(a).

problem Petitioner complains of here should not come up again. Thus, reviewing this case would not be time well spent.

II. THE LEGAL ISSUES PETITIONER RAISES ARE WELL-SETTLED

In addition to the fact that this case raises no important federal question, the legal issues involved here are well-settled, and simply do not merit review by this Court.

A. THE COURT BELOW APPLIED THE PROPER STANDARD OF REVIEW

First, Petitioner claims the court below applied the wrong standard of review. She asserts that the scope of arbitration clauses should be reviewed *de novo*. But the standard of review applicable to arbitration clauses is not the issue. The orders from which Petitioner appealed are orders enforcing the *Sullivan* and *Hartley* settlements and injunctions. The district court's enforcement of a settlement agreement is reviewed for an abuse of discretion. *Wilkinson v. Federal Bureau of Investigation*, 922 F.2d 555, 558 (9th Cir. 1991); *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987). Likewise, the district court's grant of a permanent injunction is reviewed for an abuse of discretion. *Multnomah Legal Services Workers Union v. Legal Services Corp.*, 936 F.2d 1547, 1552 (9th Cir. 1991); *Beaton v. Thompson*, 913 F.2d 701, 702 (9th Cir. 1990). The abuse of discretion standard applied by the court below was undoubtedly correct.

B. THE DECISION OF THE COURT BELOW AFFIRMING THE INHERENT AUTHORITY OF FEDERAL COURTS TO ENFORCE THEIR OWN INJUNCTIONS DOES NOT CONTRAVENE THE FEDERAL ARBITRATION ACT

Next, Petitioner asserts that the court below somehow created an improper "judicial exception" to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, by affirming the district courts' enforcement of the *Sullivan* and *Hartley* class action settlements and injunctions. In fact, there was no agreement to arbitrate the settled claims. To conjure up such an agreement, Petitioner must ignore both the fact that she was judicially enjoined from arbitrating her released Stamford Towers and Radisson Plaza claims in the first place, and the fact that Shearson never "agreed" to arbitrate those claims.

In order to bring this case within the confines of the FAA, Petitioner asserts that the court below erred in failing to find that Shearson agreed to arbitrate the arbitrability of the Stamford Towers and Radisson Plaza claims. But the court below was right. Shearson never made such an agreement. In claiming that it did, Petitioner's argument is circular: Because Shearson first raised its preclusion defense in arbitration and participated in arbitration before seeking relief in the district court, Shearson "agreed" to arbitrate the arbitrability of those claims. Petition, at 45-50. This defies the facts and common sense.

As the court below correctly noted, Shearson's Answer in arbitration expressly preserved its objection that the Radisson Plaza and Stamford Towers claims were

precluded and barred. App. A-10. The Submission Agreements, which Shearson was required by NASD rules to submit in order to proceed with the remainder of Petitioner's arbitration claim, contained a clear limitation on what Shearson was agreeing to submit to arbitration: "the present matter in controversy, as set forth in the attached statement of claim *and answers*. . . . " App. A-60; A-64. Shearson stated in its Answer that Petitioner's Radisson Plaza and Stamford Towers claims were *not* arbitrable. Thus, the Submission Agreements did *not* submit the arbitrability of Petitioner's released claims to arbitration.

In any event, the interpretation of disputed submission agreements presents a fact-specific question peculiar to this case, not an issue of widespread and continuing interest. This is another reason the Court should decline to review the decision below.

After mischaracterizing Shearson's conduct as an agreement to arbitrate, Petitioner engages in a lengthy discussion of the federal policy favoring arbitration which is entirely beside the point. Petition, at 30. Equally irrelevant is her discussion of the legal standard for determining arbitrability when claim preclusion is *not* an issue. Petition, at 31-40. None of the cases Petitioner cites for determining whether a dispute is arbitrable involved an attempt to arbitrate settled and released claims. The issue is not whether courts tend to encourage arbitration or rigorously enforce agreements to arbitrate. The issue is whether the courts that enjoined Petitioner from arbitrating her settled class action claims here had authority to enforce those injunctions and properly did so. In the absence of any agreement to arbitrate the impact of the

class action settlements, Petitioner has no viable argument that the district courts erred in enforcing their own injunctions.

C. EVEN IF SHEARSON HAD AGREED TO ARBITRATE THESE CLAIMS, THE DISTRICT COURTS HAD AUTHORITY TO ENFORCE THEIR OWN JUDGMENTS

Even if Shearson *had* agreed to arbitrate the question of whether Petitioner's Stamford Towers and Radisson Plaza claims were barred, which it did not, the district courts properly enforced the *Sullivan* and *Hartley* injunctions with respect to these claims. As Petitioner notes, the FAA provides that a written agreement to submit a controversy to arbitration is valid and enforceable absent legal or equitable grounds for its revocation. However, Petitioner's own cases hold that an agreement to arbitrate statutory rights will not be enforced where the statutory rights at issue (here, a district court's power to enforce its own injunction) give rise to "an inherent conflict between arbitration and the statute's underlying purposes."[7] *See,*

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[7] On this point, Petitioner notes that one court has ruled that there is no "inherent conflict" between Federal Rule of Civil Procedure 23, which governs class actions, and the FAA. *Nielsen v. Greenwood*, Fed. Sec. L. Rep. (CCH) ¶ 97,408 (N.D. Ill. 1993). However, the issue in *Nielsen* was whether two investors who had agreed to arbitrate claims against an underwriter could assert the policy favoring class actions to invalidate their arbitration agreements. The court held that they could not. That holding has no bearing on the inherent conflict between allowing arbitration of enjoined claims and a court's broad authority to enforce its own injunction.

e.g., Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987). Thus, any such "agreement" would be unenforceable in light of the inherent conflict between such an agreement and the expansive language of 28 U.S.C. § 1651.

Section 1651 grants the federal courts broad injunctive power to protect their own judgments. 28 U.S.C. § 1651; *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 600 (1993); *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971). Under Section 1651, federal courts have the power to issue *"all writs necessary or appropriate* in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (emphasis added). This power rests with the court, not the litigants, and is not limited to relief the parties may request. *See, e.g., Delta Air Lines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 587 (11th Cir. 1983) (district court can best determine whether its judgment is threatened by subsequent litigation, and is thus empowered to enjoin arbitration proceedings that jeopardize its prior judgment regardless of a party's action or inaction). Thus, this power is independent from, and unaffected by, the FAA. A district court acting to enforce its own judgment and injunction, and an appellate court that affirms such an act, are not creating an "exception" to anything.

Thus, Petitioner is wrong when she suggests that parties can agree to arbitrate claims that a federal court has ordered enjoined and barred merely because there is a federal policy favoring arbitration. To adopt such a rule would raise an inherent conflict between arbitration and

the authority of the court, and would eviscerate Section 1651's express purpose of providing federal courts with the power to do whatever is necessary or appropriate to enforce their own judgments.

This broad authority clearly includes the power to enjoin arbitration proceedings. As a general principle, the district court's injunctive power specifically includes the authority to enjoin arbitration to prevent relitigation of claims. *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 600 (1993). And more to the point, the district court's jurisdiction to enforce the terms of a class action settlement includes the power to enjoin further prosecution of settled claims by class members in arbitration proceedings.

This rule is illustrated by *In re VMS Securities Litigation*, 145 F.R.D. 458 (N.D. Ill. 1992), *aff'd*, 21 F.3d 139 (7th Cir. 1994). In the *VMS* case, the district court granted defendant's motion to enforce a class action settlement despite the fact that the defendant had already litigated the matter in arbitration, unsuccessfully raised the defense that the arbitration claims were precluded by the class action settlement, and then proceeded on the merits and lost the arbitration. The district court ruled that it retained jurisdiction to enforce its class action judgment and settlement agreement and enjoined the customer from enforcing the arbitration award. The Seventh Circuit affirmed, and held in addition that the arbitrators had exceeded their authority by even considering the barred class action claims in the arbitration proceeding. *Id.* at 145. Indeed, the *VMS* case is particularly instructive here,

because it establishes that a district court properly exercises its authority to enforce its prior injunction even *after* the merits of released class action claims have been addressed in arbitration.

D. PETITIONER'S REMAINING ARGUMENTS LACK MERIT

In her struggle to create an unsettled issue of law where none exists, Petitioner argues that Ninth Circuit's decision renders Section 12(d) of the NASD Code of Arbitration Procedure "null and void." This is preposterous. As Petitioner acknowledges, Section 12(d) was not enacted until *after* the orders in question here were issued.[8] Thus, the procedures and deadlines delineated in Section 12(d) did not apply to, and were not violated by, Shearson's conduct. Its applicability is not, and never has been, an issue in this case. In any event, the Ninth Circuit's decision is completely consistent with Section 12(d), which expressly provides that a party who believes claims encompassed by a class action are improperly being pursued in arbitration "may elect . . . to petition the court with jurisdiction over the putative or certified class action to resolve such disputes." Section 12(d).

Finally, Petitioner complains that the Ninth Circuit's decision is "unfair," because it allows a party who submits a case to arbitration to remove the matter to a

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[8] Because Section 12(d) was not effective until *October*, 1992, it would have been literally impossible for Shearson to have complied with that rule within ten days of the arbitration panel's *January*, 1992 notice referring the matter to an arbitration panel. Petition, at 43 n.8.

judicial forum if the arbitration does not go in its favor. Petition, at 44. She suggests that such an outcome was condemned in *Halley Optical Corp. v. Jagar Int'l Marketing Corp.*, 752 F. Supp. 638, 639-40 (S.D.N.Y. 1990).

That result has been approved in other cases (*see, e.g., PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 512-14 (3d Cir. 1990); *In re VMS Securities Litigation*, 145 F.R.D. 458 (N.D. Ill. 1992), *aff'd*, 21 F.3d 139 (7th Cir. 1994)), but that is not what happened here. In *Halley*, a defendant moved to vacate an unfavorable arbitration award. Here, the arbitrators have never ruled, favorably or unfavorably, on Petitioner's Stamford Towers and Radisson Plaza claims. Thus, Shearson did not go to the district court to forum shop with the benefit of hindsight, as Petitioner suggests. Indeed, the only thing "unfair" about this case is that Shearson, who paid millions to finally settle all claims regarding Radisson Plaza and Stamford Towers, has been forced to face them again in arbitration by Petitioner, who cashed Shearson's settlement checks in exchange for her release of these claims. Nor is it fair for Shearson to undergo the process of review by this Court, when all Petitioner seeks is a chance to have her claims precluded by a different forum.

E. THE SETTLEMENT NOTICES SATISFIED CONSTITUTIONAL REQUIREMENTS

Finally, Petitioner complains that the court below erroneously ruled that the settlement notices she received adequately informed her of the consequences of remaining a class member, as required by the Fifth Amendment to the Constitution. But this is a fact-specific dispute over

the adequacy of information in a particular notice. It does not present a question of interest to anyone other than Petitioner. Thus, it is not an appropriate issue for review by the Court.

Moreover, it is well-settled that the notice given to class members for the approval of a class settlement need only fairly apprise them of the subject matter of the suit, the proposed terms of the settlement, and their opportunity to be heard. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977). Accordingly, the notice may contain only a "very general description" of the proposed settlement. *Mendoza v. United States*, 623 F.2d 1338, 1351 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). As stated in *Bennett v. Behring Corp.*, 96 F.R.D. 343 (S.D. Fla. 1982), "[i]t is not the function of the settlement notice to fully inform the class of all the details of the settlement, but merely to put class members on notice of the general parameters of the settlement and to inform them of where information as to the specifics may be obtained." *See also Grunin*, 513 F.2d at 122.

This is exactly what was provided by the settlement notices here. As Petitioner concedes, the court-approved notices in question generally described the litigation, listed the causes of action in the complaints, stated that those claims *and others* would be dismissed, advised Petitioner of her options with respect to remaining a class member, invited her to examine the full settlement agreements, and gave her the opportunity to consult with class counsel or her own lawyer. Finally, the notices provided the dates and times of the settlement hearings, and

informed Petitioner of her right to appear at the hearings or object to the settlements.

Petitioner supports her claim that the class notices were inadequate by misquoting those notices. As noted in the Opposition of Respondents and Plaintiffs' Class Counsel to Petition for Writ of Certiorari, Petitioner selectively fails to quote the language in both notices describing the preclusive effects of remaining a class member, and misquotes the language she does cite to create the impression that the description of the claims being released was narrower than the notices actually provided. *See* Class Counsel's Opposition, at 2-4.

Petitioner also glosses over her own failure to review the complete *Sullivan* and *Hartley* settlement agreements. Where, as here, a class notice satisfies due process requirements, class members have a duty to ascertain any additional facts necessary to their decision to opt out or accept the benefits of the settlement. *In re Four Seasons Securities Laws Litigation*, 525 F.2d 500, 503 (10th Cir. 1975) (party who made no effort to examine available court files "cannot now be heard to complain that he did not know what they would have revealed."). "Class members are not expected to rely upon the notices as a complete source of settlement information." *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). Petitioner could easily have obtained more information, including the entire Settlement Agreements containing the detailed language of the class members' release of claims, had she taken the time to do so.

The notices provided in *Sullivan* and *Hartley* were adequate and satisfied constitutional due process requirements.

Petitioner cannot blame her failure to understand the implications of these settlements on any defect in the notices themselves.

CONCLUSION

There is no reason for this Court to review this case, which presents neither a conflict in decisions, nor any substantial federal question. The Petition should be denied.

Respectfully Submitted,

JOHN R. REESE
DONN P. PICKETT*
KAREN KENNARD
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

Attorneys for Respondent

* Counsel of Record

McCUTCHEN, DOYLE,
BROWN & ENERSEN
Of Counsel

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